106TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPT. 106–494
Part I

SMALL BUSINESS LIABILITY REFORM ACT OF 2000

FEBRUARY 7, 2000.—Ordered to be printed

Mr. HYDE, from the Committee on Judiciary, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 2366]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2366) to provide small businesses certain protections from litigation excesses and to limit the product liability of nonmanufacturer product sellers, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

TABLE OF CONTENTS

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Small Business Liability Reform Act of 2000".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

TITLE I—SMALL BUSINESS LAWSUIT ABUSE PROTECTION

SEC. 101. FINDINGS.

Congress finds that—

(1) the defects in the United States civil justice system have a direct and undesirable effect on interstate commerce by decreasing the availability of goods and services in commerce;

(2) there is a need to restore rationality, certainty, and fairness to the legal system;

(3) the spiralling costs of litigation and the magnitude and unpredictability of punitive damage awards and noneconomic damage awards have continued unabated for at least the past 30 years;

(4) the Supreme Court of the United States has recognized that a punitive damage award can be unconstitutional if the award is grossly excessive in relation to the legitimate interest of the government in the punishment and deterrence of unlawful conduct;

(5) just as punitive damage awards can be grossly excessive, so can it be grossly excessive in some circumstances for a party to be held responsible under the doctrine of joint and several liability for damages that party did not cause;

(6) as a result of joint and several liability, entities including small businesses are often brought into litigation despite the fact that their conduct may have little or nothing to do with the accident or transaction giving rise to the lawsuit, and may therefore face increased and unjust costs due to the possibility or result of unfair and disproportionate damage awards;

(7) the costs imposed by the civil justice system on small businesses are particularly acute, since small businesses often lack the resources to bear those costs and to challenge unwarranted lawsuits;

(8) due to high liability costs and unwarranted litigation costs, small businesses face higher costs in purchasing insurance through interstate insurance markets to cover their activities;

(9) liability reform for small businesses will promote the free flow of goods and services, lessen burdens on interstate commerce, and decrease litigiousness; and

(10) legislation to address these concerns is an appropriate exercise of the powers of Congress under clauses 3, 9, and 18 of section 8 of article I of the Constitution of the United States, and the 14th amendment to the Constitution of the United States.

SEC. 102. DEFINITIONS.

In this title:

(1) CRIME OF VIOLENCE.—The term "crime of violence" has the same meaning as in section 16 of title 18, United States Code.

(2) DRUG.—The term "drug" means any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) that was not legally prescribed for use by the defendant or that was taken by the defendant other than in accordance with the terms of a lawfully issued prescription.

(3) ECONOMIC LOSS.—The term "economic loss" means any pecuniary loss resulting from harm (including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities) to the extent recovery for such loss is allowed under applicable State law.

(4) HARM.—The term "harm" means any physical injury, illness, disease, or death or damage to property.

(5) HATE CRIME.—The term "hate crime" means a crime described in section 1(b) of the Hate Crime Statistics Act (28 U.S.C. 534 note).

(6) INTERNATIONAL TERRORISM.—The term "international terrorism" has the same meaning as in section 2331 of title 18, United States Code.

(7) NONECONOMIC LOSS.—The term "noneconomic loss" means loss for physical or emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), injury to reputation, or any other nonpecuniary loss of any kind or nature.

(8) PERSON.—The term "person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity (including any governmental entity).

(9) SMALL BUSINESS.—

(A) IN GENERAL.—The term "small business" means any unincorporated business, or any partnership, corporation, association, unit of local government, or organization that has fewer than 25 full-time employees as determined on the date the civil action involving the small business is filed.

(B) CALCULATION OF NUMBER OF EMPLOYEES.—For purposes of subparagraph (A), the number of employees of a subsidiary of a wholly owned corporation includes the employees of—

(i) a parent corporation; and

(ii) any other subsidiary corporation of that parent corporation.

(10) STATE.—The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, any other territory or possession of the United States, or any political subdivision of any such State, commonwealth, territory, or possession.

SEC. 103. LIMITATION ON PUNITIVE DAMAGES FOR SMALL BUSINESSES.

(a) GENERAL RULE.—Except as provided in section 105, in any civil action against a small business, punitive damages may, to the extent permitted by applicable State law, be awarded against the small business only if the claimant establishes by clear and convincing evidence that conduct carried out by that defendant through willful misconduct or with a conscious, flagrant indifference to the rights or safety of others was the proximate cause of the harm that is the subject of the action.

(b) LIMITATION ON AMOUNT.—In any civil action against a small business, punitive damages shall not exceed the lesser of—

(1) 3 times the total amount awarded to the claimant for economic and noneconomic losses; or

(2) $250,000.

SEC. 104. LIMITATION ON JOINT AND SEVERAL LIABILITY FOR NONECONOMIC LOSS FOR SMALL BUSINESSES.

(a) GENERAL RULE.—Except as provided in section 105, in any civil action against a small business, the liability of each defendant that is a small business, or the agent of a small business, for noneconomic loss shall be determined in accordance with subsection (b).

(b) AMOUNT OF LIABILITY.—

(1) IN GENERAL.—In any civil action described in subsection (a)—

(A) each defendant described in that subsection shall be liable only for the amount of noneconomic loss allocated to that defendant in direct proportion to the percentage of responsibility of that defendant (determined in accordance with paragraph (2)) for the harm to the claimant with respect to which that defendant is liable; and

(B) the court shall render a separate judgment against each defendant described in that subsection in an amount determined under subparagraph (A).

(2) PERCENTAGE OF RESPONSIBILITY.—For purposes of determining the amount of noneconomic loss allocated to a defendant under this section, the trier of fact shall determine the percentage of responsibility of each person responsible for the harm to the claimant, regardless of whether or not the person is a party to the action.

SEC. 105. EXCEPTIONS TO LIMITATIONS ON LIABILITY.

The limitations on liability under sections 103 and 104 do not apply—

(1) to any defendant whose misconduct—

(A) constitutes—

(i) a crime of violence;

(ii) an act of international terrorism; or

(iii) a hate crime;

(B) results in liability for damages relating to the injury to, destruction of, loss of, or loss of use of, natural resources described in—

(i) section 1002(b)(2)(A) of the Oil Pollution Act of 1990 (33 U.S.C. 2702(b)(2)(A)); or

(ii) section 107(a)(4)(C) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9607(a)(4)(C));

(C) involves—

(i) a sexual offense, as defined by applicable State law; or

(ii) a violation of a Federal or State civil rights law;

(D) occurred at the time the defendant was under the influence (as determined under applicable State law) of intoxicating alcohol or a drug, and the fact that the defendant was under the influence was the cause of any harm alleged by the plaintiff in the subject action; or

(2) to any cause of action which is brought under the provisions of title 31, United States Code, relating to false claims (31 U.S.C. 3729–3733) or to any other cause of action brought by the United States relating to fraud or false statements.

SEC. 106. PREEMPTION AND ELECTION OF STATE NONAPPLICABILITY.

(a) PREEMPTION.—Subject to subsection (b), this title preempts the laws of any State to the extent that State laws are inconsistent with this title.

(b) ELECTION OF STATE REGARDING NONAPPLICABILITY.—This title does not apply to any action in a State court against a small business in which all parties are citizens of the State, if the State enacts a statute—

(1) citing the authority of this subsection;

(2) declaring the election of such State that this title does not apply as of a date certain to such actions in the State; and

(3) containing no other provision.

TITLE II—PRODUCT SELLER FAIR TREATMENT

SEC. 201. FINDINGS; PURPOSES.

(a) FINDINGS.—Congress finds that—

(1) although damage awards in product liability actions may encourage the production of safer products, they may also have a direct effect on interstate commerce and consumers of the United States by increasing the cost of, and decreasing the availability of, products;

(2) some of the rules of law governing product liability actions are inconsistent within and among the States, resulting in differences in State laws that may be inequitable with respect to plaintiffs and defendants and may impose burdens on interstate commerce;

(3) product liability awards may jeopardize the financial well-being of individuals and industries, particularly the small businesses of the United States;

(4) because the product liability laws of a State may have adverse effects on consumers and businesses in many other States, it is appropriate for the Federal Government to enact national, uniform product liability laws that preempt State laws; and

(5) under clause 3 of section 8 of article I of the United States Constitution, it is the constitutional role of the Federal Government to remove barriers to interstate commerce.

(b) PURPOSES.—The purposes of this title, based on the powers of the United States under clause 3 of section 8 of article I of the United States Constitution, are to promote the free flow of goods and services and lessen the burdens on interstate commerce, by—

(1) establishing certain uniform legal principles of product liability that provide a fair balance among the interests of all parties in the chain of production, distribution, and use of products; and

(2) reducing the unacceptable costs and delays in product liability actions caused by excessive litigation that harms both plaintiffs and defendants.

SEC. 202. DEFINITIONS.

In this title:

(1) ALCOHOL PRODUCT.—The term "alcohol product" includes any product that contains not less than ½ of 1 percent of alcohol by volume and is intended for human consumption.

(2) CLAIMANT.—The term "claimant" means any person who brings an action covered by this title and any person on whose behalf such an action is brought. If such an action is brought through or on behalf of an estate, the term includes the claimant's decedent. If such an action is brought through or on behalf of a minor or incompetent, the term includes the claimant's legal guardian.

(3) COMMERCIAL LOSS.—The term "commercial loss" means—

(A) any loss or damage solely to a product itself;

(B) loss relating to a dispute over the value of a product; or

(C) consequential economic loss, the recovery of which is governed by applicable State commercial or contract laws that are similar to the Uniform Commercial Code.

(4) COMPENSATORY DAMAGES.—The term "compensatory damages" means damages awarded for economic and noneconomic losses.

(5) DRAM-SHOP.—The term "dram-shop" means a drinking establishment where alcoholic beverages are sold to be consumed on the premises.

(6) ECONOMIC LOSS.—The term "economic loss" means any pecuniary loss resulting from harm (including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities) to the extent recovery for that loss is allowed under applicable State law.

(7) HARM.—The term "harm" means any physical injury, illness, disease, or death or damage to property caused by a product. The term does not include commercial loss.

(8) MANUFACTURER.—The term "manufacturer" means—

(A) any person who—

(i) is engaged in a business to produce, create, make, or construct any product (or component part of a product); and

(ii)(I) designs or formulates the product (or component part of the product); or

(II) has engaged another person to design or formulate the product (or component part of the product);

(B) a product seller, but only with respect to those aspects of a product (or component part of a product) that are created or affected when, before placing the product in the stream of commerce, the product seller—

(i) produces, creates, makes, constructs and designs, or formulates an aspect of the product (or component part of the product) made by another person; or

(ii) has engaged another person to design or formulate an aspect of the product (or component part of the product) made by another person; or

(C) any product seller not described in subparagraph (B) that holds itself out as a manufacturer to the user of the product.

(9) NONECONOMIC LOSS.—The term "noneconomic loss" means loss for physical or emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companion-

ship, loss of consortium (other than loss of domestic service), injury to reputation, or any other nonpecuniary loss of any kind or nature.

(10) PERSON.—The term "person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity (including any governmental entity).

(11) PRODUCT.—

(A) IN GENERAL.—The term "product" means any object, substance, mixture, or raw material in a gaseous, liquid, or solid state that—

(i) is capable of delivery itself or as an assembled whole, in a mixed or combined state, or as a component part or ingredient;

(ii) is produced for introduction into trade or commerce;

(iii) has intrinsic economic value; and

(iv) is intended for sale or lease to persons for commercial or personal use.

(B) EXCLUSION.—The term "product" does not include—

(i) tissue, organs, blood, and blood products used for therapeutic or medical purposes, except to the extent that such tissue, organs, blood, and blood products (or the provision thereof) are subject, under applicable State law, to a standard of liability other than negligence; or

(ii) electricity, water delivered by a utility, natural gas, or steam.

(12) PRODUCT LIABILITY ACTION.—

(A) GENERAL RULE.—Except as provided in subparagraph (B), the term "product liability action" means a civil action brought on any theory for a claim for any physical injury, illness, disease, death, or damage to property that is caused by a product.

(B) The following claims are not included in the term "product liability action":

(i) NEGLIGENT ENTRUSTMENT.—A claim for negligent entrustment.

(ii) NEGLIGENCE PER SE.—A claim brought under a theory of negligence per se.

(iii) DRAM-SHOP.—A claim brought under a theory of dram-shop or third-party liability arising out of the sale or providing of an alcoholic product to an intoxicated person or minor.

(13) PRODUCT SELLER.—

(A) IN GENERAL.—The term "product seller" means a person who in the course of a business conducted for that purpose—

(i) sells, distributes, rents, leases, prepares, blends, packages, labels, or otherwise is involved in placing a product in the stream of commerce; or

(ii) installs, repairs, refurbishes, reconditions, or maintains the harm-causing aspect of the product.

(B) EXCLUSION.—The term "product seller" does not include—

(i) a seller or lessor of real property;

(ii) a provider of professional services in any case in which the sale or use of a product is incidental to the transaction and the essence of the transaction is the furnishing of judgment, skill, or services; or

(iii) any person who—

(I) acts in only a financial capacity with respect to the sale of a product; or

(II) leases a product under a lease arrangement in which the lessor does not initially select the leased product and does not during the lease term ordinarily control the daily operations and maintenance of the product.

(14) STATE.—The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, any other territory or possession of the United States, or any political subdivision of any such State, commonwealth, territory, or possession.

SEC. 203. APPLICABILITY; PREEMPTION.

(a) APPLICABILITY.—

(1) IN GENERAL.—Except as provided in paragraph (2), this title governs any product liability action brought in any Federal or State court.

(2) ACTIONS FOR COMMERCIAL LOSS.—A civil action brought for commercial loss shall be governed only by applicable State commercial or contract laws that are similar to the Uniform Commercial Code.

(b) RELATIONSHIP TO STATE LAW.—This title supersedes a State law only to the extent that the State law applies to an issue covered by this title. Any issue that

is not governed by this title, including any standard of liability applicable to a manufacturer, shall be governed by any applicable Federal or State law.

(c) EFFECT ON OTHER LAW.—Nothing in this title shall be construed to—

(1) waive or affect any defense of sovereign immunity asserted by any State under any State law;

(2) supersede or alter any Federal law;

(3) waive or affect any defense of sovereign immunity asserted by the United States;

(4) affect the applicability of any provision of chapter 97 of title 28, United States Code;

(5) preempt State choice-of-law rules with respect to claims brought by a foreign nation or a citizen of a foreign nation;

(6) affect the right of any court to transfer venue or to apply the law of a foreign nation or to dismiss a claim of a foreign nation or of a citizen of a foreign nation on the ground of inconvenient forum; or

(7) supersede or modify any statutory or common law, including any law providing for an action to abate a nuisance, that authorizes a person to institute an action for civil damages or civil penalties, cleanup costs, injunctions, restitution, cost recovery, punitive damages, or any other form of relief, for remediation of the environment (as defined in section 101(8) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601(8))).

SEC. 204. LIABILITY RULES APPLICABLE TO PRODUCT SELLERS, RENTERS, AND LESSORS.

(a) GENERAL RULE.—

(1) IN GENERAL.—In any product liability action covered under this title, a product seller other than a manufacturer shall be liable to a claimant only if the claimant establishes that—

(A)(i) the product that allegedly caused the harm that is the subject of the complaint was sold, rented, or leased by the product seller;

(ii) the product seller failed to exercise reasonable care with respect to the product; and

(iii) the failure to exercise reasonable care was a proximate cause of the harm to the claimant;

(B)(i) the product seller made an express warranty applicable to the product that allegedly caused the harm that is the subject of the complaint, independent of any express warranty made by a manufacturer as to the same product;

(ii) the product failed to conform to the warranty; and

(iii) the failure of the product to conform to the warranty caused the harm to the claimant; or

(C)(i) the product seller engaged in intentional wrongdoing, as determined under applicable State law; and

(ii) the intentional wrongdoing caused the harm that is the subject of the complaint.

(2) REASONABLE OPPORTUNITY FOR INSPECTION.—For purposes of paragraph (1)(A)(ii), a product seller shall not be considered to have failed to exercise reasonable care with respect to a product based upon an alleged failure to inspect the product, if—

(A) the failure occurred because there was no reasonable opportunity to inspect the product; or

(B) the inspection, in the exercise of reasonable care, would not have revealed the aspect of the product that allegedly caused the claimant's harm.

(b) SPECIAL RULE.—

(1) IN GENERAL.—A product seller shall be deemed to be liable as a manufacturer of a product for harm caused by the product, if—

(A) the manufacturer is not subject to service of process under the laws of any State in which the action may be brought; or

(B) the court determines that the claimant is or would be unable to enforce a judgment against the manufacturer.

(2) STATUTE OF LIMITATIONS.—For purposes of this subsection only, the statute of limitations applicable to claims asserting liability of a product seller as a manufacturer shall be tolled from the date of the filing of a complaint against the manufacturer to the date that judgment is entered against the manufacturer.

(c) RENTED OR LEASED PRODUCTS.—

(1) DEFINITION.—For purposes of paragraph (2), and for determining the applicability of this title to any person subject to that paragraph, the term "product liability action" means a civil action brought on any theory for harm caused by a product or product use.

(2) LIABILITY.—Notwithstanding any other provision of law, any person engaged in the business of renting or leasing a product (other than a person excluded from the definition of product seller under section 202(13)(B)) shall be subject to liability in a product liability action under subsection (a), but any person engaged in the business of renting or leasing a product shall not be liable to a claimant for the tortious act of another solely by reason of ownership of that product.

SEC. 205. FEDERAL CAUSE OF ACTION PRECLUDED.

The district courts of the United States shall not have jurisdiction under this title based on section 1331 or 1337 of title 28, United States Code.

TITLE III—EFFECTIVE DATE

SEC. 301. EFFECTIVE DATE.

This Act shall take effect with respect to any civil action commenced after the date of enactment of this Act without regard to whether the harm that is the subject of the action occurred before such date.

PURPOSE AND SUMMARY

Small businesses with 25 or fewer full-time workers employ nearly 60% of the American workforce, yet over 60% of these small business owners make an annual salary of less than $50,000. One lawsuit—frivolous or not—could put a small business out of business. There is evidence that particularly the smallest of the nation's small businesses operate in fear that they will be named a defendant in a lawsuit, be found minimally responsible for the claimant's harm, and be financially crushed under the weight of all the damages as a result of the application of joint liability. In many cases, small businesses settle out of court for significant award amounts, even if the claim is unwarranted, because of the fear of exposure to unlimited punitive damages. According to a recent Gallup survey, one out of five of every small businesses decides not to hire more employees, expand its business, introduce a new product, or improve an existing product out of fear of litigation.

Likewise, inconsistencies within and among the States in rules of law governing product liability actions result in differences in State laws that may be inequitable with respect to plaintiffs and defendants, which, in turn, impose burdens on interstate commerce. Establishing uniform legal principles of liability for product seller, lessors, and renters will provide a fair balance among the interest of all parties in the chain of product manufacturing, distribution, and use, reduce costs and delays in product liability actions, and reduce burdens on interstate commerce.

Product sellers (wholesalers, distributors, and retailers) face needless and wasteful entanglement in product liability suits when they have only acted as a conduit between the manufacturer and the customer. Like a blameless messenger who is punished for merely conveying disappointing news, product sellers can be held liable for merely conveying goods between parties. Time and money are wasted as a result of this unfair liability rule.

The Small Business Liability Reform Act of 2000 addresses these concerns by creating uniform rules which will improve the fairness

of the civil justice system, enhance its predictability, and reduce unnecessary litigation.

BACKGROUND AND NEED FOR THE LEGISLATION

Title I—Small Business Lawsuit Abuse Protection

Title I of the Act creates rules to protect the smallest of businesses (those with fewer than 25 full-time employees) against excessive punitive damages awards and holds them liable for noneconomic damages, such as pain and suffering, in proportion to their "fair share" of fault for the claimant's harm.

Because of their modest individual economic basis, which belies their importance as a principal engine driving the economy, many small businesses would be forced into bankruptcy by even a single punitive damages award. An excessive award would almost certainly mean loss of jobs and the potential for the small business owner to lose his or her entire savings. Crippling joint liability without regard for the actual role played by a business in an incident can have the same result, which is particularly unfair when the business played only the smallest of roles. The costs imposed by the current civil justice system on small businesses, especially from excessive punitive damage awards and as a result of joint liability, are particularly burdensome on small businesses, because these businesses often lack the resources to bear the costs associated with challenging unwarranted lawsuits. Because of the burden imposed by the civil justice system on small businesses, competition in the marketplace for goods and services is impeded and the availability of goods and services in interstate commerce is diminished. Liability reform for small businesses will, therefore, promote the free flow of goods and services, lessen burdens on interstate commerce, decrease litigiousness, and provide greater predictability and fairness in the civil justice system.

The costs of defense as well as the enormous financial uncertainty from situations such as these threaten the continued viability of American businesses and certainly impose a competitive burden. The testimony of Roger Geiger, on behalf of the Ohio Chapter of the National Federation of Independent Business, supports this conclusion. Mr. Geiger testified that the maximum possible punitive damages award against a small business under the Act—$250,000—would alone bankrupt 59.1 percent of Ohio small businesses. He also stated that the average cost of civil litigation in Ohio ($50,000 per case) forces small businesses into otherwise unjustified nuisance settlements because they cannot afford to fight. His testimony also emphasized that proper reforms at the Federal level are necessary because, although the Ohio legislature has responded dozens of times to correct lawsuit abuses, the Ohio Supreme Court has nullified those laws on State constitutional grounds.

Over the years, attempts to justify broad expansion of liability have, as a practical matter, been based in part on the assumption that as between plaintiffs and corporate defendants, businesses can better bear losses because they can obtain insurance. However, this is not the case for small businesses. Because of the high cost of liability insurance, and the low capitalization rate of many of these

small entities, carrying insurance is a luxury they cannot afford. Furthermore, small businesses are responding to the threat of being sued by considering purchasing less insurance, not more. Their rationale is that less insurance will actually reduce their litigation risk by making them a less lucrative target for plaintiffs' lawyers when compared to entities that are actually responsible for an accident.

1. Punitive Damage Liability Reform

Punitive damages, or exemplary damages, are intended to be quasi-criminal in nature. They are not designed to compensate victims, but are awarded in civil suits to punish for intentional harm to others or for acting in wanton disregard with respect to the safety of others. In addition to punishing wrongdoers, they are intended to deter such anti-social conduct in the future.

Title I imposes two distinct requirements on the imposition of punitive damages awards against a small business. First, it requires a plaintiff to establish "by clear and convincing evidence that conduct carried out by that defendant through willful misconduct or with a conscious, flagrant indifference to the rights or safety of others was the proximate cause of the harm that is the subject of the action." Second, it limits the award of punitive damages against a small business defendant to three times the total amount awarded for economic and noneconomic losses, or $250,000, whichever is lesser.

2. Limitation on Joint and Several Liability

Title I also prohibits the imposition of joint and several liability on a small business defendant. Under the traditional rule of joint and several liability, where more than one defendant is found liable in a case, each defendant found liable may be held responsible for paying 100% of the damages awarded. While the plaintiff cannot recover more than once, it can choose the defendant from whom to seek recovery. A defendant who pays more than its proportionate share of the damages can in turn seek contribution from other defendants or can sue another defendant for indemnification of its costs. Thus, in an automobile accident case where the other driver and the auto manufacturer are co-defendants, if a jury finds the other driver 75% responsible for the accident and the manufacturer 25% responsible, the plaintiff may recover 100% of its damages from the manufacturer (which may be considered a "deep pocket"). In turn, the manufacturer is left to seek contribution from the other driver (or its insurance company) for 75%.

By enabling a plaintiff to recover immediately all its damages from the "deep pocket" defendant, joint and several liability makes it more likely that the plaintiff will obtain full recovery in the event that one defendant does not have the assets to pay part of the judgment. The result, however, may be that a defendant who is minimally responsible for an injury, perhaps only 1% responsible, may be held liable for virtually all compensation damages—both economic and non-economic. Also, very often those more responsible for the harm are not even parties to the action. They may have settled with the plaintiff out of court, they may be beyond the

jurisdiction of the Court, or they may simply be lacking in sufficient assets to pay the award (*i.e.*, bankrupt).

The Act would eliminate joint and several liability of small business defendants for non-economic damages (pain and suffering), but would retain it for economic damages (such as medical expenses). This would partially relieve the situation where a small business defendant is held liable for damages far in excess of its actual responsibility. Consequently, any small business defendant found liable would be liable for pain and suffering only in proportion to its percentage of responsibility for the plaintiff's injury and no more. The liability of defendants who do not fall within the definition of a small business would continue to be governed by the existing State liability rule.

Title II—Product Seller Fair Treatment

The United States Commerce Department reports that, on average, over 70% of the products that are manufactured in a particular State are shipped out of the State and sold.[1] The current patchwork of varying State product liability laws sends confusing and often conflicting signals to those who use, make, or sell products in the United States. Uncertainties in our Nation's product liability system create unnecessary legal costs and impede interstate commerce and stifle innovation, among other problems. Title II of the Act simplifies the law and reduces the costs and unpredictability of the current product liability system. It provides sound rules in product liability actions for those in the chain of distribution who are without fault in causing a harm. Title II of the Act also shields product renters and lessors from being held liable for someone else's wrongful conduct simply due to product ownership.

1. Liability Rules Applicable to Product Sellers

Title II is aimed at restoring legal fairness to product sellers and reducing costs to consumers. In a majority of the States, product sellers are liable for harms caused by a product as if they were the manufacturer. Ultimately, product sellers are held liable in less than five percent of product liability actions; nevertheless, they are drawn into the overwhelming majority of product liability cases. This is because 31 States treat product sellers as if they manufactured the product—they are made liable for a manufacturer's mistakes. The seller, however, rarely pays the judgment because it is able to show in over 95% of the cases where any liability is present that the manufacturer is the party who actually caused, and is responsible for, the harm. Based on this showing, the seller gets contribution or indemnity from the manufacturer, and the manufacturer ultimately pays the damages.

The current state of the law generates substantial, unnecessary legal costs. Many product sellers are small wholesalers and retailers. This provision will prevent wasted time and effort for these small businesses and also, wasted expenses on attorneys. These costs are currently passed on to the consumer in the form of unnecessary higher prices for products and services. Thus, this provision

[1] See Commodity Transportation Survey, U.S. Dept. of Commerce, Bureau of the Census, Table 1, pp. 1–7 (1977).

also helps consumers by cutting the hidden "litigation tax." It would be much more efficient for the claimant to sue the manufacturer directly and to sue the product seller only if it has done something wrong. The testimony of George Keeley, on behalf of the National Association of Wholesaler-Distributors, emphasized the impact of the damage done to the reputation of a business and the drain on resources that can result when a wholesaler, retailer, or distributor is dragged into litigation over a harm it did not cause. Although rarely ultimately responsible, product sellers are routinely named as defendants in product liability litigation with consequent damage to their reputations, lost time, and lost productivity. The Act will reduce this unfair impact while providing injured claimants with an avenue to obtain recovery.

The Small Business Liability Reform Act of 2000 provides a logical solution to this problem. Under the bill, product sellers would no longer be subject to strict liability—they would be liable only for their own negligence or fault, breach of their own warranty, or intentional wrongdoing. Thus, the legislation would eliminate product sellers being needlessly brought into product liability lawsuits.

To protect consumers, there are two key exceptions to the general rule: (1) where a manufacturer cannot be brought into court in the State; or, (2) if a manufacturer lacks the funds to pay a judgment. In these circumstances, the product seller would have to bear responsibility for the manufacturer's conduct. There is a sound social policy behind this provision—it will encourage product sellers to deal with responsible (often domestic) manufacturers who do business in the State and have assets.

Companies that rent or lease products, such as car and truck rental firms, are currently subject in 10 States and the District of Columbia to liability for the tortious acts of their renters and lessees, even though the rental company is not negligent and there is no defect in the product. In these States, by imposition of this theory of vicarious liability, the rental company is held liable for the injuries and damages caused by the negligence of its customers simply because it owns the product and has given permission for its use by the customer.

Title II provides that a person engaged in the business of renting or leasing a product may not be liable to a claimant for the tortious act of another, solely because that person owns the product that caused the injury. This eliminates the theory of vicarious liability under those circumstances.

The need for this reform is illustrated by the plight of Sharon Faulkner, the former owner of the now-defunct Capitaland Car Rental, Inc., which was an independent car rental company headquartered in Albany, New York. After operating for 17 years, Capitaland was put out of business when it rented a car to a licensed driver, who then gave the car to her son, an unauthorized driver. The son was then involved in an accident. Capitaland was held liable, despite the fact that the use of the car by an unauthorized driver was barred by the rental agreement and Capitaland could have done nothing to prevent the accident. Capitaland was held liable simply due to the fact it owned the automobile. The Act will change that unfairness by holding product renters and lessors

liable when they are negligent or failed to maintain the product properly, but not simply due to their ownership of the product.

Because Capitaland was the sole means of support for herself and her three children, Ms. Faulkner decided she could not face such unlimited uncertainty with each rental. Capitaland went out of business. In surrendering to the irrationality of the law she faced, Ms. Faulkner joined the owners of more than 300 other independent car rental companies that have closed since 1990 in New York State alone, drastically reducing competition in the car rental industry to the detriment of consumers.

Enactment of the reforms contained in H.R. 2366 would have prevented Capitaland and other car rental companies from being drawn into litigation over events that they had no control, and the attendant economic burdens that defense costs and judgments impose.

HEARINGS

The full committee held a legislative hearing on H.R. 2366 on September 29, 1999. Testimony was received from Richard E. Dinger, President, Crescenta Valley Insurance of Glendale, California, on behalf of the Independent Insurance Agents of America, Inc.; David E. Harker, President and Chief Executive Officer of Excaliber Exploration, Inc., in Greentown, Ohio, representing the National Federation of Independent Business; Sharon Faulkner, Regional Manager, Premier Car Rental Company in Albany, New York, a subsidiary of Budget Rent A Car Corporation; Thomas L. Bantle, Legislative Counsel, Public Citizen's Congress Watch; George Keeley, on behalf of the National Association of Wholesaler-Distributors; Richard Middleton, Jr., President of the Association of Trial Lawyers of America; Dr. Ralph Estes, Emeritus Professor of Accounting at the American University Business School and director of the national Stakeholder Alliance; and Roger R. Geiger, State Executive Director for the Ohio Chapter of the National Federation of Independent Business.

COMMITTEE CONSIDERATION

On October 19, 1999, October 27, 1999, and February 1, 2000, the committee met in open session and ordered favorably reported the bill H.R. 2366, with amendment, by voice vote, a quorum being present.

VOTE OF THE COMMITTEE

The following votes occurred during committee deliberation on H.R. 2366:

1. An amendment by Mr. Conyers to add new sections 108 and 207 relating to preemption of State law. The Conyers amendment was defeated by a roll call vote of 13 to 15.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Sensenbrenner		X	
Mr. McCollum		X	

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Gekas		X	
Mr. Coble		X	
Mr. Smith (TX)		X	
Mr. Gallegly			
Mr. Canady		X	
Mr. Goodlatte			
Mr. Chabot		X	
Mr. Barr		X	
Mr. Jenkins		X	
Mr. Hutchinson		X	
Mr. Pease			
Mr. Cannon		X	
Mr. Rogan		X	
Mr. Graham			
Ms. Bono		X	
Mr. Bachus		X	
Mr. Scarborough			
Mr. Vitter		X	
Mr. Conyers	X		
Mr. Frank	X		
Mr. Berman			
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler	X		
Mr. Rothman	X		
Ms. Baldwin	X		
Mr. Weiner			
Mr. Hyde, Chairman	X		
Total	13	15	

2. An amendment by Ms. Jackson Lee to require the Attorney General and the Small Business Administration to conduct a study of suits filed against small business. The Jackson Lee amendment was defeated by a roll call vote of 10 to 17.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Sensenbrenner		X	
Mr. McCollum		X	
Mr. Gekas		X	
Mr. Coble		X	
Mr. Smith (TX)		X	
Mr. Gallegly		X	
Mr. Canady		X	
Mr. Goodlatte			
Mr. Chabot		X	
Mr. Barr			
Mr. Jenkins			
Mr. Hutchinson		X	
Mr. Pease			
Mr. Cannon		X	
Mr. Rogan		X	

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Graham			
Ms. Bono		X	
Mr. Bachus		X	
Mr. Scarborough			
Mr. Vitter		X	
Mr. Conyers			
Mr. Frank		X	
Mr. Berman			
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler	X		
Mr. Rothman	X		
Ms. Baldwin	X		
Mr. Weiner		X	
Mr. Hyde, Chairman		X	
Total	10	17	

3. An amendment by Ms. Jackson Lee, Mr. Nadler, and Mr. Conyers to redefine the term "hate crime." The Jackson Lee/Nadler/Conyers amendment was defeated by a roll call vote of 12 to 13.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Sensenbrenner			
Mr. McCollum		X	
Mr. Gekas		X	
Mr. Coble		X	
Mr. Smith (TX)			
Mr. Gallegly		X	
Mr. Canady		X	
Mr. Goodlatte			
Mr. Chabot		X	
Mr. Barr			
Mr. Jenkins			
Mr. Hutchinson		X	
Mr. Pease			
Mr. Cannon		X	
Mr. Rogan		X	
Mr. Graham			
Ms. Bono		X	
Mr. Bachus		X	
Mr. Scarborough			
Mr. Vitter		X	
Mr. Conyers			
Mr. Frank	X		
Mr. Berman			
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler	X		
Mr. Rothman	X		
Ms. Baldwin	X		
Mr. Weiner	X		
Mr. Hyde, Chairman		X	
Total	12	13	

4. An amendment by Mr. Nadler to change the punitive damage cap to the greater of three times compensatory damages or $250,000. The Nadler amendment was defeated by a roll call vote of 14 to 14.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Sensenbrenner		X	
Mr. McCollum		X	
Mr. Gekas		X	
Mr. Coble	X		
Mr. Smith (TX)		X	
Mr. Gallegly		X	
Mr. Canady		X	
Mr. Goodlatte			
Mr. Chabot		X	
Mr. Barr		X	
Mr. Jenkins	X		
Mr. Hutchinson		X	
Mr. Pease			
Mr. Cannon			
Mr. Rogan		X	
Mr. Graham			
Ms. Bono		X	
Mr. Bachus		X	
Mr. Scarborough			
Mr. Vitter		X	
Mr. Conyers	X		
Mr. Frank	X		
Mr. Berman	X		
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee			
Ms. Waters	X		
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler	X		
Mr. Rothman	X		
Ms. Baldwin	X		
Mr. Weiner			
Mr. Hyde, Chairman		X	
Total	14	14	

5. An amendment by Ms. Lofgren to create exceptions to the Act for certain cases involving firearms or ammunition. The Lofgren amendment was defeated by a roll call vote of 11 to 16.

ROLLCALL NO. 5

	Ayes	Nays	Present
Mr. Sensenbrenner		X	
Mr. McCollum			
Mr. Gekas		X	
Mr. Coble		X	
Mr. Smith (TX)		X	
Mr. Gallegly		X	
Mr. Canady		X	
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Barr		X	
Mr. Jenkins		X	
Mr. Hutchinson		X	
Mr. Pease			
Mr. Cannon			
Mr. Rogan		X	
Mr. Graham			
Ms. Bono		X	
Mr. Bachus		X	
Mr. Scarborough			
Mr. Vitter		X	
Mr. Conyers	X		
Mr. Frank	X		
Mr. Berman	X		
Mr. Boucher			
Mr. Nadler			
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee			
Ms. Waters	X		
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler	X		
Mr. Rothman	X		
Ms. Baldwin	X		
Mr. Weiner			
Mr. Hyde, Chairman		X	
Total	11	16	

6. An amendment by Mr. Watt to strike a section describing how the percentage of responsibility of a defendant for harm caused to a claimant is to be determined. The Watt amendment was defeated by a roll call vote of 10 to 16.

ROLLCALL NO. 6

	Ayes	Nays	Present
Mr. Sensenbrenner		X	
Mr. McCollum			
Mr. Gekas		X	
Mr. Coble		X	
Mr. Smith (TX)		X	
Mr. Gallegly		X	
Mr. Canady		X	
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Barr		X	
Mr. Jenkins		X	
Mr. Hutchinson		X	
Mr. Pease			

ROLLCALL NO. 6—Continued

	Ayes	Nays	Present
Mr. Cannon			
Mr. Rogan		X	
Mr. Graham			
Ms. Bono		X	
Mr. Bachus		X	
Mr. Scarborough			
Mr. Vitter			
Mr. Conyers	X		
Mr. Frank		X	
Mr. Berman	X		
Mr. Boucher			
Mr. Nadler			
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee			
Ms. Waters	X		
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler	X		
Mr. Rothman	X		
Ms. Baldwin	X		
Mr. Weiner			
Mr. Hyde, Chairman		X	
Total	10	16	

7. An amendment by Mr. Watt to strike Title II. The Watt amendment was defeated by a roll call vote of 9 to 15.

ROLLCALL NO. 7

	Ayes	Nays	Present
Mr. Sensenbrenner		X	
Mr. McCollum			
Mr. Gekas		X	
Mr. Coble		X	
Mr. Smith (TX)		X	
Mr. Gallegly		X	
Mr. Canady		X	
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Barr		X	
Mr. Jenkins		X	
Mr. Hutchinson			
Mr. Pease			
Mr. Cannon			
Mr. Rogan		X	
Mr. Graham			
Ms. Bono		X	
Mr. Bachus		X	
Mr. Scarborough			
Mr. Vitter			
Mr. Conyers	X		
Mr. Frank		X	
Mr. Berman			
Mr. Boucher			
Mr. Nadler			
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee			

ROLLCALL NO. 7—Continued

	Ayes	Nays	Present
Ms. Waters	X		
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler	X		
Mr. Rothman	X		
Ms. Baldwin	X		
Mr. Weiner			
Mr. Hyde, Chairman		X	
Total	9	15	

8. An amendment by Mr. Watt to delete section 205, relating to Federal jurisdiction. The Watt amendment was defeated by a roll call vote of 11 to 12.

ROLLCALL NO. 8

	Ayes	Nays	Present
Mr. Sensenbrenner		X	
Mr. McCollum			
Mr. Gekas			
Mr. Coble		X	
Mr. Smith (TX)		X	
Mr. Gallegly		X	
Mr. Canady		X	
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Barr		X	
Mr. Jenkins		X	
Mr. Hutchinson			
Mr. Pease			
Mr. Cannon			
Mr. Rogan		X	
Mr. Graham			
Ms. Bono			
Mr. Bachus		X	
Mr. Scarborough			
Mr. Vitter			
Mr. Conyers	X		
Mr. Frank	X		
Mr. Berman	X		
Mr. Boucher			
Mr. Nadler			
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee			
Ms. Waters	X		
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler	X		
Mr. Rothman	X		
Ms. Baldwin	X		
Mr. Weiner			
Mr. Hyde, Chairman		X	
Total	11	12	

9. An amendment by Mr. Scott to the Canady amendment in the nature of a substitute to strike section 103 relating to punitive

damage limitations. The Scott amendment was defeated by a roll call vote of 12 to 16.

ROLLCALL NO. 9

	Ayes	Nays	Present
Mr. Sensenbrenner			
Mr. McCollum			
Mr. Gekas		X	
Mr. Coble	X		
Mr. Smith (TX)		X	
Mr. Gallegly		X	
Mr. Canady		X	
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Barr		X	
Mr. Jenkins		X	
Mr. Hutchinson		X	
Mr. Pease		X	
Mr. Cannon		X	
Mr. Rogan		X	
Mr. Graham			
Ms. Bono			
Mr. Bachus			
Mr. Scarborough		X	
Mr. Vitter		X	
Mr. Conyers	X		
Mr. Frank		X	
Mr. Berman			
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters			
Mr. Meehan			
Mr. Delahunt	X		
Mr. Wexler	X		
Mr. Rothman	X		
Ms. Baldwin	X		
Mr. Weiner	X		
Mr. Hyde, Chairman		X	
Total	12	16	

10. An amendment by Mr. Scott to the Canady amendment in the nature of a substitute to strike section 104 relating to limitations on joint and several liability. The Scott amendment was defeated by a roll call vote of 10 to 17.

ROLLCALL NO. 10

	Ayes	Nays	Present
Mr. Sensenbrenner			
Mr. McCollum			
Mr. Gekas		X	
Mr. Coble		X	
Mr. Smith (TX)		X	
Mr. Gallegly		X	
Mr. Canady		X	
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Barr		X	

ROLLCALL NO. 10—Continued

	Ayes	Nays	Present
Mr. Jenkins		X	
Mr. Hutchinson		X	
Mr. Pease		X	
Mr. Cannon		X	
Mr. Rogan		X	
Mr. Graham			
Ms. Bono			
Mr. Bachus			
Mr. Scarborough		X	
Mr. Vitter		X	
Mr. Conyers	X		
Mr. Frank		X	
Mr. Berman			
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee			
Ms. Waters			
Mr. Meehan			
Mr. Delahunt	X		
Mr. Wexler	X		
Mr. Rothman	X		
Ms. Baldwin	X		
Mr. Weiner	X		
Mr. Hyde, Chairman		X	
Total	10	17	

11. An amendment by Mr. Watt to the Canady amendment in the nature of a substitute to strike the preclusion of Federal jurisdiction under 28 USC 1337. The Watt amendment was defeated by a roll call vote of 13 to 16.

ROLLCALL NO. 11

	Ayes	Nays	Present
Mr. Sensenbrenner		X	
Mr. McCollum			
Mr. Gekas		X	
Mr. Coble		X	
Mr. Smith (TX)		X	
Mr. Gallegly		X	
Mr. Canady		X	
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Barr		X	
Mr. Jenkins	X		
Mr. Hutchinson		X	
Mr. Pease		X	
Mr. Cannon		X	
Mr. Rogan		X	
Mr. Graham			
Ms. Bono			
Mr. Bachus			
Mr. Scarborough		X	
Mr. Vitter		X	
Mr. Conyers	X		
Mr. Frank	X		
Mr. Berman	X		

ROLLCALL NO. 11—Continued

	Ayes	Nays	Present
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee			
Ms. Waters	X		
Mr. Meehan			
Mr. Delahunt	X		
Mr. Wexler			
Mr. Rothman	X		
Ms. Baldwin	X		
Mr. Weiner	X		
Mr. Hyde, Chairman		X	
Total	13	16	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the committee reports that the findings and recommendation of the committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM FINDINGS

No findings or recommendations of the Committee on Government Reform were received as referred to in clause 3(c)(4) of rule XIII of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of House Rule XIII is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the committee sets forth, with respect to the bill, H.R. 2366, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, February 7, 1999.

Hon. HENRY J. HYDE, *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate and intergovernmental mandate statement for H.R. 2366, the Small Business Liability Reform Act

of 2000. The estimated impact of the legislation on the private sector will be provided later.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Lanette J. Keith (for federal costs), who can be reached at 226–2860, and Lisa Cash Driskill (for the state and local impact), who can be reached at 225–3220.

Sincerely,

DAN L. CRIPPEN, *Director.*

cc: Honorable John Conyers Jr.
Ranking Democratic Member

SUMMARY

CBO estimates that enacting this bill would have no significant impact on the federal budget. Because the bill would not affect direct spending or receipts, pay-as-you-go procedures would not apply. H.R. 2366 contains intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA), but CBO estimates that the costs would not be significant and thus would not exceed the threshold established in that act ($50 million in 1996, adjusted annually for inflation).

H.R. 2366 would limit the amount of punitive damages that may be awarded to a plaintiff against a small business to three times the plaintiff's compensatory damages, or $250,000, whichever is smaller. This limitation on a small business' liability would not apply in cases that involve misconduct by the defendant—including a crime of violence, terrorism, a hate crime, or intoxication.

The bill also would limit joint and several liability for noneconomic losses for small businesses to the proportion for which each defendant is responsible. Under current law, all plaintiffs in such cases are liable for up to 100 percent of the claimants noneconomic losses. In addition, H.R. 2366 would set new standards of product liability for product sellers, renters, and lessors that are small businesses.

ESTIMATED COST TO THE FEDERAL GOVERNMENT

While some product liability cases are tried in federal court, the majority of such cases are handled in state courts. Based on information from the Administrative Office of the United States Courts, CBO estimates that enacting this bill would have no significant impact on the number of cases that would be referred to federal courts. Thus, we estimate that enacting H.R. 2366 would have no significant impact on the federal budget.

ESTIMATED IMPACT ON STATE, LOCAL, AND TRIBAL GOVERNMENTS

H.R. 2366 contains intergovernmental mandates as defined in UMRA, but CBO estimates that those mandates would not impose significant costs on state, local, or tribal governments. The bill would preempt state law by applying federal requirements to certain liability cases filed in state courts, and by subjecting state and local governments, as potential plaintiffs, to those requirements.

A state could go above H.R. 2366's cap on punitive damages only if it enacts a law following specific procedures set forth in the bill.

Any state laws that set caps on punitive damages awarded to small businesses that are lower than those in the bill would not be preempted by H.R. 2366. In certain cases, as plaintiffs, state and local governments would be subject to the caps set on punitive damages and to the standards for providing the liability of product sellers and small businesses.

The bill also would define small business to include units of local government with fewer than 25 employees. Thus, in cases where such governments are civil defendants, the bill could provide a benefit in the form of protection from paying large punitive damages.

ESTIMATED IMPACT ON THE PRIVATE SECTOR

CBO's estimate of the impact of this legislation on the private sector will be provided later in a separate statement.

ESTIMATE PREPARED BY:

Federal Costs: Lanette J. Keith (226–2860)
Impact on State, Local, and Tribal Governments: Lisa Cash Driskill (225–3220)

ESTIMATE APPROVED BY:

Peter H. Fontaine
Deputy Assistant Director for Budget Analysis

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the committee finds the authority for this legislation in Article I, clause 8 of the United States Constitution and the 14th amendment to the United States Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

SECTION 1. SHORT TITLE AND TABLE OF CONTENTS

Section 1(a) identifies the short title of the legislation as the "Small Business Liability Reform Act of 2000" (hereinafter called the "Act"). Section 1(b) sets forth the Table of Contents to the Act.

TITLE I—SMALL BUSINESS LAWSUIT ABUSE PROTECTION

SECTION 101. FINDINGS

Section 101 contains the "Findings" of Congress with respect to this title of the Act.

Congress finds that—

(1) the defects in the United States civil justice system have a direct and undesirable effect on interstate commerce by decreasing the availability of goods and services in commerce;

(2) there is a need to restore rationality, certainty, and fairness to the legal system;

(3) the spiraling costs of litigation and the magnitude and unpredictability of punitive damage awards and noneconomic damage awards have continued unabated for at least the past 30 years;

(4) the Supreme Court of the United States has recognized that a punitive damage award can be unconstitutional if the award is

grossly excessive in relation to the legitimate interest of the government in the punishment and deterrence of unlawful conduct;

(5) just as punitive damage awards can be grossly excessive, so can it be grossly excessive in some circumstances for a party to be held responsible under the doctrine of joint and several liability for damages that party did not cause;

(6) as a result of joint and several liability, entities including small businesses are often brought into litigation despite the fact that their conduct may have little or nothing to do with the accident or transaction giving rise to the lawsuit, and may therefore face increased and unjust costs due to the possibility or result of unfair and disproportionate damage awards;

(7) the costs imposed on the civil justice system on small businesses are particularly acute, since small businesses often lack the resources to bear those costs and to challenge unwarranted lawsuits;

(8) due to high liability costs and unwarranted litigation costs, small businesses face higher costs in purchasing insurance through interstate insurance markets to cover their activities;

(9) liability reform for small businesses will promote the free flow of goods and services, lessen burdens on interstate commerce, and decrease litigiousness; and

(10) legislation to address these concerns is an appropriate exercise of the powers of Congress under clauses 3, 9, and 18 of section 8 article I of the Constitution of the United States, and the 14th amendment to the Constitution of the United States.

SECTION 102. DEFINITIONS

Section 102 defines the following terms or phrases used in this title of the Act:

(1) *Crime of Violence.*—The term has the same meaning as in section 16 of title 18, United States Code.

(2) *Drug.*—The term means any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)) that was not legally prescribed for use by the defendant or that was taken by the defendant other than in accordance with the terms or a lawfully issued prescription.

(3) *Economic Loss.*—The term means any pecuniary loss resulting from harm (including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities) to the extent recovery for such loss is allowed under applicable State law. The essential distinction between economic and noneconomic loss is that economic loss is subject to empirical measurement and confirmation. In contrast, noneconomic loss, such as "pain and suffering," is not capable of measurement according to an objective standard.

(4) *Harm.*—The term is defined to include any physical injury, illness, disease, or death or damage to property.

(5) *Hate Crime.*—The term means a crime described in section 1(b) of the Hate Crimes Statistics Act (28 USC 534 note).

(6) *International Terrorism.*—The term has the same meaning as in section 2331 of title 18, United States Code.

(7) *Noneconomic Loss.*—The term means loss for physical or emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), injury to reputation, or any other nonpecuniary loss of any kind or nature.

(8) *Person.*—The term means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity (including any governmental entity).

(9) *Small Business.*—The term is defined as any unincorporated business, or any partnership, corporation, association, unit of local government, or organization that has fewer than 25 full-time employees. For purposes of calculating the number of employees, the number of employees of a subsidiary of a wholly owned corporation includes the employees of a parent corporation, and any other subsidiary corporation of that parent corporation. The determination of whether a defendant meets this definition is to be made as of the time of the filing of the complaint.

(10) *State.*—The term means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, and any other territory or possession of the United States, or any political subdivision of any such State, commonwealth, territory, or possession.

SECTION 103. LIMITATION ON PUNITIVE DAMAGES FOR SMALL BUSINESSES

Section 103 outlines the circumstances under which punitive damages may be awarded in civil actions against small businesses. Punitive damages may be awarded in any civil action against a small business if a claimant establishes by "clear and convincing evidence" that his or her harm was proximately caused by the small business defendant's "willful misconduct" or "conscious, flagrant indifference to the rights or safety of others." Punitive damages are limited to the lesser of $250,000 or three times the claimant's compensatory damages (*i.e.*, economic and noneconomic damages).

Punitive damages are quasi-criminal in nature; they are awarded to punish, not to compensate for harm. Punitive damages developed out of English law to serve as a "helper" to the criminal law and the focus was, and should be on, conduct that was of such a publicly egregious nature that it should be subject to criminal punishment. Punitive damages are not intended to compensate people to "make them whole" for something they have lost; that purpose is accomplished by compensatory damages, which provide compensation for both economic losses (*e.g.*, lost wages, medical expenses, substitute domestic services) and noneconomic losses (*e.g.*, "pain and suffering").

Nevertheless, unlike the criminal law system, in many States there are virtually no standards for when punitive damages may be awarded and no clear guidelines as to their amount. The result is uncertainty and instability, possible due process violations, and a chilling effect on economic growth and innovation.

Consistent with the United States Supreme Court's recognition that punitive damages are a form of punishment, the Act provides the fundamentals that are part of any criminal punishment: it defines the "offense," establishes a level of proof necessary for punishment, and makes the punishment proportional to the "offense." At present, punitive damages laws in many States fail these requirements, as evidenced by the United States Supreme Court's observation that punitive damages awards in this country have "run wild." [2]

Title I of the Act permits punitive damages to be awarded against a small business upon proof that the defendant engaged in "willful misconduct" or violated the standard of "conscious, flagrant indifference to the rights or safety of others." This standard reflects the quasi-criminal nature of punitive damages and is similar to the standards of many States. The standard conveys that punitive damages are to be awarded only in serious cases of outrageous misconduct.

The punitive damages liability standard in this title is already Federal law in actions involving volunteers of nonprofit organizations. That law, the Volunteer Protection Act of 1997,[3] was enacted with broad bipartisan support.

Title I of the Act also explains how a claimant must prove the "offense" against a small business and requires that the proof be "clear and convincing." Clear and convincing evidence means that measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. The standard reflects the quasi-criminal nature of punitive damages by taking a middle ground between the burden of proof standard ordinarily used in civil cases (*i.e.*, proof by a "preponderance of the evidence") and the criminal law standard (*i.e.*, proof "beyond a reasonable doubt").

The "clear and convincing evidence" burden of proof standard is now law in 29 States and the District of Columbia,[4] and has been recommended by each of the principal academic groups to analyze the law of punitive damages, including the American Bar Association, the American College of Trial Lawyers, and the National Conference of Commissioners on Uniform State Laws.[5] The Supreme

---

[2] *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 18 (1991).

[3] Pub. L. No. 105–19, 111 Stat. 218.

[4] See Ala. Code § 6–11–20 (1999); Alaska Stat. § 09.17.020 (1999); Cal. Civ. Code § 3294(a) (1999); Fla. Stat. 768.73 (1998); Ga. Code Ann. § 51–12–5.1 (1999); Iowa Code Ann. § 668A.1 (1997); Kan. Stat. Ann. § 60–3701(c) (1998); Ky. Rev. Stat. Ann. § 411.184(2) (Michie/Bobbs-Merrill 1998); Minn. Stat. Ann. § 549.20 (West Supp. 1998); Miss. Code Ann. § 11–1–65(1)(a) (Supp. 1998); Mont. Code Ann. § 27–1–221(5) (1998); N.J. Stat. Ann. § 2A:15–5.12 (1999); Nev. Rev. Stat. Ann. § 42–005(1) (1998); N.C. Gen. Stat. 10–15(b) (1999); N.D. Cent. Code § 32–03.2–11 (Supp. 1999); Ohio Rev. Code Ann. § 2307.80(A) (Anderson 1999); Okla. Stat. Ann. tit. 23, § 9.1 (West Supp. 1998); Or. Rev. Stat. § 18.537 (1997); S.C. Code Ann. § 15–33–135 (Law. Co-op. Supp. 1998); S.D. Codified Laws Ann. § 21–1–4.1 (1999); Tex. Civ. Prac. & Rem. Code § 41.003 (1999); Utah Code Ann. § 78–18–1 (1999); *Linthicum* v. *Nationwide Life Ins. Co.*, 723 P.2d 675 (Ariz. 1986); *Jonathan Woodner, Co.* v. *Breeden*, 665 A.2d 929 (D.C. 1995), *cert. denied*, 519 U.S. 1148 (1997); *Masaki* v. *General Motors Corp.*, 780 P.2d 566 (Haw. 1989); *Travelers Indem. Co.* v. *Armstrong*, 442 N.E.2d 349 (Ind. 1982); *Tuttel* v. *Raymond*, 494 A.2d 1353 (Me. 1985); *Owens-Illinois* v. *Zenobia*, 601 A.2d 633 (Md. 1992); *Hodges* v. *S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992); *Wangen* v. *Ford Motor Co.*, 294 N.W.2d 437 (Wis. 1980); *Rodriguez* v. *Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996). One State, Colorado, requires proof "beyond a reasonable doubt" in punitive damages cases. See Colo. Rev. Stat. § 13–25–127(2) (1987).

[5] See American Bar Association, *Special Committee on Punitive Damages of the American Bar Association, Section on Litigation, Punitive Damages: A Constructive Examination* 19 (1986) [hereinafter ABA Report]; American College of Trial Lawyers, *Report on Punitive Damages of*

Continued

Court has specifically endorsed the "clear and convincing evidence" burden of proof standard in punitive damages cases.[6]

The "clear and convincing evidence" burden of proof standard in punitive damages cases is already Federal law in actions involving volunteers of nonprofit organizations. As stated above, that law, the Volunteer Protection Act of 1997, was enacted with broad bipartisan support.

Title I of the Act also puts reasonable parameters on punitive damages against small businesses to make the punishment fit the offense. Proportionality has been an important part of the Supreme Court's consideration of the validity of criminal punishment. Even very serious crimes such as larceny, robbery, and arson have sentences defined with a maximum set forth in a statute. And the Supreme Court has ruled in *BMW* v. *Gore*, 116 S.Ct. 1589, 1604 (1996), that the Due Process Clause of the 14th amendment imposes a substantive limit on the size of punitive damage awards.

Title I sets forth the maximum single punishment against a small business as the lesser of three times the amount awarded to the claimant for economic and noneconomic losses, or $250,000 (*i.e.*, $250,000 is the maximum).

Excessive punitive damages awards are a problem for any defendant in the civil justice system. The threat of runaway punitive damages liability, however, is particularly acute for small businesses. A punitive damages award exceeding $250,000 would bankrupt most small businesses. One also must remember that any such award would be in addition to the compensatory damages awarded to the plaintiff—which itself could be very substantial.

Furthermore, small businesses can find themselves subject to unwarranted pressure to settle cases in which punitive damages are claimed. Settlement is where "the action is" in civil litigation. Ninety percent or more of civil cases settle out of court and not subject to appeal. That is why the argument frequently heard from opponents of reform that headline-grabbing punitive damages awards are often reduced on appeal misses the mark. The argument ignores the fact that the threat of punitive damages is abused as a "wild card" to force extortionate settlements. The "club" of punitive damages is very heavy when held over the head of a small business defendant.[7]

It has been argued that proportionality may result in inadequate deterrence. As Thomas Jefferson noted, however, over two hundred years ago, "if the punishment were only proportional to the injury, men would feel that their inclination as well as their duty to see the laws observed."[8] Indeed, Federal antitrust laws have worked well for decades with punishment set in proportion to actual losses.

---

the Committee on Special Problems in the Administration of Justice 15–16 (1989) [hereinafter ACTL Report]; National Conference Of Commissioners On Uniform State Laws, *Uniform Law Commissioners' Model Punitive Damages Act* §5 (approved on July 18, 1996) [hereinafter Uniform Law Commissioners' Model Punitive Damages Act]. See also American Law Institute, 2 *Enterprise Responsibility for Personal Injury—Reporters' Study* 248–49 (1991) [hereinafter ALI Reporters' Study].

[6] See *Pacific Mutual Life Ins. Co.*, 499 U.S. at 23 n.11 (stating that "there is much to be said in favor of a State's requiring, as many do, . . . a standard of "clear and convincing evidence'").

[7] In some States, punitive damages are not insurable. Thus, a small business is subject to unwarranted pressure to settle a case for compensatory damages, which are insurable; a punitive damages award could end the business.

[8] Thomas Jefferson, *A Bill for Proportioning Crimes and Punishment in Cases Heretofore Capital*, 1779, in *Papers of Thomas Jefferson*, 2:492, 493 (Julian P. Boyd ed. 1950).

Furthermore, it should be remembered that there is no limit on the number of times a small business can be punished under the Act and that when a business engages in wrongful conduct, he or she does not know how many people will be hurt and how much harm might occur. Thus, there is simply no way for a defendant to predetermine the actual damages of all persons who may be injured by its conduct.

It has also been argued that totally unlimited punitive damages are needed to police corporate wrongdoing. This assertion is not supported by fact. There is no credible evidence that behavior of small businesses, or any businesses for that matter, is less safe in either those States that have set limits on punitive damages or in the six States (Louisiana, Nebraska, Washington, New Hampshire, Massachusetts, and Michigan)[9] that do not permit punitive damages at all. Furthermore, plaintiffs in these States have no more difficulty obtaining legal representation than in those States where the "sky is the limit."

Finally, it has been suggested that a proportionality requirement for punitive damages could be unfair to women and other groups that tend to recover less in compensatory (economic and noneconomic) damages than other groups, because it could reduce the amount such individuals may recover in punitive damages. First, this argument totally misapprehends the basic premise that punitive damages have absolutely nothing to do with compensating an individual for a loss—punitive damages are purely a "windfall" to the claimant.

Second, the argument ignores the needs of women and minority groups in business, particularly small businesses, whose face threats to their enterprises as a result of unlimited punitive damages. The U.S. Small Business Administration's Office of Women's Business Ownership reports that there are 8 million women-owned businesses in the United States and that women-owned businesses make up one third of all small businesses in this country.[10] The U.S. Small Business Administration's Office of Advocacy reports that, by 1997, there were an estimated 3.25 million minority-owned businesses in the U.S., generating $495 billion in revenues, and employing nearly 4 million workers.[11] From 1987 to 1997, the number of minority-owned businesses increased 168 percent, while revenues grew twice as fast—343 percent. Federal punitive damages reform would benefit these businesses greatly.

The Act does not create a cause of action for punitive damages or provide for recovery of punitive damages in those States where such damages do not exist. Similarly, punitive damages reforms at the State level that apply to businesses not covered by the title are unaffected by the legislation. The Act does create a uniform, national punitive damages standard of liability, burden of proof, and cap for small businesses in actions that are governed by the Act.

---

[9] Michigan permits "exemplary" damages as compensation for mental suffering consisting of a sense of insult, indignity, humiliation, or injury to feelings, but does not permit punitive damages for purposes of punishment. See *Wise* v. *Daniel*, 190 N.W.2d 746 (Mich. 1992).

[10] Information taken from U.S. Small Business Administration website (http://www.onlinewbc.org/docs/about/about—sba.html).

[11] See United States Small Business Administration, Office of Advocacy, *Minority Business* report.

Section 103(a) provides that, except as provided in section 105 (exceptions to limits on liability), in any civil action against a small business, punitive damages may, to the extent permitted by applicable State law, be awarded against a small business only if the claimant establishes by clear and convincing evidence that conduct carried out by the defendant through willful misconduct or with a conscious, flagrant indifference to the rights and safety of others was the proximate cause of the harm that is the subject of the action.

Section 103(b) provides that in any civil action against a small business, punitive damages shall not exceed the lesser of 3 times the total amount awarded to the claimant for economic and noneconomic losses, or $250,000.

SECTION 104. LIMITATIONS ON SEVERAL LIABILITY FOR NONECONOMIC LOSS FOR SMALL BUSINESSES

Section 104 is intended to bring legal fairness and predictability to small businesses facing civil litigation. It creates a sense of proportionality between the actions of small businesses and their civil liability. It holds small business defendants liable only for their "fair share" of responsibility for a claimant's noneconomic damages, such as pain and suffering.

The provision is modeled after a California law that was adopted by voter referendum in 1986. That law served as the basis for a recent Federal law, the Volunteer Protection Act of 1997, which abolished joint liability for noneconomic damages for volunteers of nonprofit organizations. The Volunteer Protection Act was overwhelmingly supported by a bipartisan majority of Congress.

The concept of "fair share" (or several) liability sounds self-evident to most people. Many States, however, give expression in their law to the principle of joint liability. In its unrestrained form, joint liability means that a defendant who is found only one percent at fault can be burdened with an entire damages award. This system is unfair, because it puts full responsibility on those who may have been only marginally at fault.

Recognizing the need for joint liability reform, over 30 States have abolished or modified the principle of joint liability. They have done so, however, in a great variety of ways and, thereby, have contributed to the already serious problem of inconsistency among our Nation's tort laws.

Title I of the Act adopts a fair and balanced approach. It permits States to apply the rule of joint liability for economic damages (*e.g.*, medical expenses and lost wages and the cost of substitute domestic services in the case of injury to a homemaker), so that claimants can recover full compensation for these losses from any one defendant. On the other hand, the title eliminates imposition of joint liability against small businesses for "noneconomic damages" (*e.g.*, damages for pain and suffering or emotional distress). This means that each small business defendant will be liable for noneconomic damages in an amount proportional to its share of fault. The title does not "cap" noneconomic damage awards.

In a case involving more than one defendant, where some defendants are small businesses and others are not, the limitation on

joint and several liability will only apply to the small business defendant.

In applying section 104, the trier of fact is to apportion responsibility for the claimant's harm in reference to all persons responsible for the claimant's loss, including defendants, third-party defendants, settled parties, non-parties, governmental entities, the claimant, and persons or entities that cannot be tried (*e.g.*, bankrupt persons, employers, and other immune entities). In 1992, the California Supreme Court unanimously held in *DaFonte* v. *Up-Right, Inc.*, 828 P.2d 140, 145 (Cal. 1992), that the California law on which section 104 is based could not achieve its purpose unless read this way.

For many years, committees in both the House of Representatives and the Senate have received numerous testimonies about the extreme and unwanted consequences of joint liability.[12] It is unfair for anyone to be in the position of Peter and be asked to pay for the sins of Paul.

Indeed, the rationale that supports joint liability—risk distribution—does not, directly or indirectly, support a law that would require any defendant to pay more than its "fair share" of a claimant's noneconomic losses. The principle of risk distribution is not only highly unfair, but also particularly unsound and inappropriate when the defendant is a small business. Risk distribution is based on the theory that a wealthy defendant is better able to distribute the cost of a risk of injury than an injured plaintiff is able to absorb it. But, most small businesses—particularly those with fewer than 25 full-time employees—are not wealthy. They may not be in a financial position that is much different than the plaintiff, and there is no reason to saddle such defendants with unfair and costly burdens beyond their share of fault.

Some opponents of joint liability reform have argued that the California approach somehow discriminates, because women or other groups may have less economic losses than others. The California approach does *not* discriminate. In fact, the California Supreme Court has ruled that the California law meets equal protection guarantees found in both the California and United States Constitutions.[13]

Moreover, Suzelle Smith, a highly respected attorney from California who represents both plaintiffs and defendants, testified before the Consumer Affairs Subcommittee of the Senate Commerce Committee in September 1993 and before the Senate Judiciary Committee in March 1994 that the California approach works, is fair to all groups, and is pro-consumer. She testified that, prior to the California initiative, her experience was that juries often rendered defense verdicts in cases in which a finding to the contrary could mean that a minimally at-fault defendant would be saddled with the entire damage award.

---

[12] See H.R. Rep. 101, 105th Cong., 1st Sess. (1997) (volunteer liability); S. Rep. No. 32, 105th Cong., 1st Sess. (1997) (product liability); H.R. Rep. No. 63, 104th Cong., 1st Sess. (1995) (product liability); H.R. Rep. No. 64, 104th Cong., 1st Sess. (1995) (product liability); S. Rep. No. 69, 104th Cong., 1st Sess. (1995) (product liability); S. Rep. No. 203, 103d Cong., 1st Sess. (1993) (product liability) ; S. Rep. No. 215, 102d Cong., 1st Sess. (1991) (product liability). In addition, Congress enacted the Biomaterials Access Assurance Act of 1998, Pub. L. No. 105–230, to address a serious public health crisis caused by joint liability in medical device litigation.

[13] See *Evangelatos* v. *Superior Court*, 753 P.2d 585 (Cal. 1988).

In addition, there has been no showing that the Volunteer Protection Act of 1997, which contains basically the same joint liability reform as this title, has been unfair or unworkable. As stated, that law was enacted with strong bipartisan support.

Finally, the argument that holding defendants liable only for their fair share of a claimant's noneconomic losses is unfair to women ignores the needs of women in business. The U.S. Small Business Administration's Office of Women's Business Ownership reports that women-owned businesses make up one third of all small businesses in this country.[14] The 1996 U.S. Census Bureau Survey of Women Owned Business Enterprises estimated that the number of women-owned start ups continues to outpace all business growth in each of the 50 States and that these businesses have almost a 250 percent growth in revenues.[15] Federal liability reform would help these women-owned businesses prosper and continue to grow.

Section 104 limits the doctrine of joint liability as applied to noneconomic damages in civil actions against small businesses. The section, however, does not preempt limitations on joint liability with respect to economic damages. Similarly, joint liability reforms at the State level that apply to businesses not covered by the title are unaffected by the legislation. The Act creates a uniform, national rule regarding the extent to which small businesses covered by the Act may be held jointly liable for a claimant's noneconomic damages.

Section 104(a) limits each small business defendant's liability for noneconomic damages to that defendant's percentage of responsibility as determined by the trier of fact. In most cases the percentage determination required by this section will not be subject to an exact mathematical computation. Rather, it will be based on the common sense approximation assigned to it by the jury or by the court. In determining the percentage of each defendant's liability, the trier of fact should take into consideration the proportionate share of each person's responsibility for the total harm caused, including that portion attributable to the claimant. The focus of the inquiry should be on the defendant's "responsibility." For example, if a defendant's share of responsibility for the harm is found to be 25%, that defendant is liable for 25% of the noneconomic damage award.

Section 104(b) provides that, for purposes of determining the amount of noneconomic loss allocated to a defendant under section 104(a), the trier of fact shall apportion responsibility for a claimant's harm in reference to all persons responsible for the injury, whether or not such person is a party to the action.

SECTION 105. EXCEPTIONS TO LIMITATIONS ON LIABILITY

Section 105 provides that the limitations on liability for small businesses in Sections 103 and 104 do not apply to any defendant whose misconduct (1) constituted a crime of violence, an act of international terrorism, or a hate crime; (2) resulted in liability for damages under specified provisions of the Oil Pollution Act of 1990

[14] Information taken from U.S. Small Business Administration website (http://www.onlinewbc.org/docs/about/about—sba.html).
[15] See *id.*

or the Comprehensive Environmental Response, Compensation, and Liability Act of 1980; (3) involved a sexual offense or violation of a Federal or State civil rights law; or (4) occurred at the time the defendant was under the influence of intoxicating alcohol or a drug and the defendant's being under the influence was the cause of any harm alleged by the plaintiff in the subject action. The limitations will also not apply to any cause of action which is brought under the False Claims Act (31 U.S.C. §§ 3729–3733) or to any other cause of action brought by the United States relating to fraud or false statments.

SECTION 106. PREEMPTION AND ELECTION OF STATE APPLICABILITY

Section 106(a) states that this title preempts State law only to the extent that applicable State laws are inconsistent with the title.

Section 106(b) permits States to elect to "opt-out" of the small business lawsuit abuse protection title with respect to any action in a State court against a small business in which all parties are citizens of the State. The State, however, must first enact a statute: (1) citing the authority of this subsection of the Act; (2) declaring the State's election that the title does not apply as of a date certain to such actions in the State; and (3) containing no other provision.

TITLE II—PRODUCT SELLER FAIR TREATMENT

SECTION 201. FINDINGS AND PURPOSES

Section 201(a) contains the findings of the Congress as to Title II:

(1) although damage awards in product liability actions may encourage the production of safer products, they may also have a direct effect on interstate commerce and consumers of the United States by increasing the cost of, and decreasing the availability of, products;

(2) some of the rules of law governing product liability actions are inconsistent within and among the States, resulting in differences in State laws that may be inequitable with respect to plaintiffs and defendants and may impose burdens on interstate commerce;

(3) product liability awards may jeopardize the financial well-being of individuals and industries, particularly the small businesses of the United States;

(4) because the product liability laws of a State may have adverse effects on consumers and businesses in many other States, it is appropriate for the Federal Government to enact national, uniform product liability laws that preempt State laws; and

(5) under clause 3 of section 8 of article I of the United States Constitution, it is the constitutional role of the Federal Government to remove barriers to interstate commerce.

Section 201(b) states that the purposes of this Act are to promote the free flow of goods and services and to lessen the burdens on interstate commerce, by: (1) establishing certain uniform legal principles of product liability that provide a fair balance among the interests of all parties to the chain of production, distribution, and

use of products; and (2) reducing the unacceptable costs and delays in product liability actions caused by excessive litigation that harms both plaintiffs and defendants.

SECTION 202. DEFINITIONS

Section 202 defines the following terms and definitions:

(1) *Alcohol Product.*—The term includes any product that contains not less than one-half of 1 percent of alcohol by volume and is intended for human consumption.

(2) *Claimant.*—The term means any person who brings a product liability action and any person on whose behalf such an action is brought. If a product liability action is brought through or on behalf of an estate, the term includes the claimant's decedent. If a product liability action is brought through or on behalf of a minor, the term includes the minor's legal guardian.

(3) *Commercial Loss.*—The term means: (A) any loss or damage solely to a product itself; (B) loss relating to a dispute over the value of a product; or (C) consequential economic loss, the recovery of which is governed by applicable State commercial or contract laws that are similar to the Uniform Commercial Code.

(4) *Compensatory Damages.*—The term means damages awarded for economic and noneconomic losses.

(5) *Dram-shop.*—The term means a drinking establishment where alcoholic beverages are sold to be consumed on the premises.

(6) *Economic Loss.*—The term means any pecuniary loss resulting from harm (including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities) to the extent recovery for such loss is allowed under applicable State law.

(7) *Harm.*—The term means any physical injury, illness, disease, or death or damage to property caused by a product. The term does not include commercial loss.

(8) *Manufacturer.*—The term means: (A) any person who (i) is engaged in a business to produce, create, make, or construct any product (or component part of a product), and (ii)(I) designs or formulates the product (or component part of the product), or (II) has engaged another person to design or formulate the product (or component part of the product); (B) a product seller, but only with respect to those aspects of a product (or component part of a product) that are created or affected when, before placing the product in the stream of commerce, the product seller, (i) produces, creates, makes, constructs and designs, or formulates an aspect of the product (or component part of the product) made by another person; or (ii) has engaged another person to design or formulate an aspect of the product (or component part of the product) made by another person; or (C) any product seller that holds itself out as a manufacturer to the user of the product.

The term does not include a person who only designs or formulates a product, such as an architect or engineer. These persons, although not liable under the Act, may be liable under traditional tort law for failure to exercise reasonable skill and care in rendering their services.

A product seller may be deemed a "manufacturer" of the product (or component part of a product) if the product seller sells or otherwise places a product or component into the stream of commerce in two situations. First, the product seller is a "manufacturer" of a product with respect to those aspects of a product (or component part of a product) which are created or affected when, before placing the product in the stream of commerce, the product seller produces, creates, makes, constructs and designs, or formulates, or has engaged another person to design or formulate, an aspect of a product (or component part of a product) made by another person.

For example, a company may manufacture a truck and deliver it to a product seller. Prior to selling that vehicle, the product seller may design and create what becomes a new aspect of the truck by, for example, adding a cabin unit. The product seller is, then, the manufacturer of the end product with respect to all aspects of the product that are affected or created by the addition (*e.g.*, the cabin unit). Thus, the product seller is the "manufacturer" with respect to defects in the cabin unit itself and with respect to defects created by adding the unit to the original truck. This rule fairly holds the product seller responsible for the consequences of designing and creating a new product from the original product; the Act does not intend to impose the manufacturer's liability on a product seller who merely cleans, paints, or reconditions the truck with parts that are designed or manufactured by someone else.

Second, a product seller is deemed to be the "manufacturer" of a product where the product seller holds itself out as the manufacturer to the user of the product. Where a product seller attaches the product seller's own private label to a product made by another, the product seller's name and reputation become a representation of the product's quality in design and manufacture. The rule holding a product seller responsible for harms caused by products that the product seller "endorses" with the product seller's private label is uniformly applied by the states.

(9) *Noneconomic Loss.*—The term means loss for physical or emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), injury to reputation, or any other nonpecuniary loss of any kind or nature.

(10) *Person.*—The term means any individual, corporation, company, association, firm, partnership, society, joint stock company or any other entity (including governmental entities).

(11) *Product.*—The term is defined as any object, substance, mixture, or raw material in a gaseous, liquid, or solid state that, at the time of manufacture (i) is capable of delivery itself or as an assembled whole, in a mixed or combined state, or as a component part or ingredient; (ii) is produced for introduction into trade or commerce; (iii) has intrinsic economic value; and (iv) is intended for sale or lease to persons for commercial or personal use. The term "product" does not include tissue, organs, blood, and blood products used for therapeutic or medical purposes, except to the extent that such tissue, organs, blood and blood products (or the provision thereof) are subject, under applicable State law, to a standard of

liability other than negligence. The term also does not include electricity, water delivered by a utility, natural gas, or steam.

(12) *Product Liability Action.*—The term means a civil action brought on any theory for any physical injury, illness, disease, death, or damage to property that is caused by a product. It does not, however, include claims for negligent entrustment, negligence per se, or under a theory of dram-shop or third-party liability arising out of the sale or providing of an alcoholic product to an intoxicated person or minor.

(13) *Product Seller.*—The term means any person who, in the course of a business conducted for that purpose sells, distributes, rents, leases, prepares, blends, packages, labels, or otherwise is involved in placing a product in the stream of commerce, or who installs, repairs, refurbishes, reconditions, or maintains the harm-causing aspect of the product.

The term specifically excludes sellers or lessors of real property. Actions against such sellers or lessors will continue to be governed by State law.

The term also excludes providers of professional services in any case in which the sale or use of a product is incidental to the transaction and the essence of the transaction is the furnishing of judgment, skill, or services. Where, for example, an engineer, pharmacist, optician, or physician provides or uses a product in connection with that person's professional services, the person is not a product seller under the Act. The majority rule is that a professional is required to exercise reasonable care, prudence, and skill in rendering services. Where failure to do so results in harm, injured persons have remedies under traditional State tort law theories and do not have a claim under this Act.

If, however, a professional engages in a commercial transaction where the essence of the transaction is not the furnishing of professional skill and judgment, the professional may be a product seller. For example, a pharmacist who sells perfume or photographic film may be a product seller within the scope of the Act. In such a case, the sale rather than the exercise of professional skill is the essence of the transaction; the action would therefore be governed by the Act.

The term "product seller" also excludes persons who act in only a financial capacity with respect to the sale of a product or who lease a product under a lease arrangement in which the lessor acts in only a financial capacity with respect to the sale of a product, or leases a product under a lease arrangement in which the lessor does not initially select the leased product and does not during the lease term ordinarily control the daily operation and maintenance of the product. Such persons, called "finance lessors," generally have no contact with the product and do not provide advice about the product or its selection. These persons merely provide the money to transfer the product to the lessee. Courts that have considered the issue uniformly hold that finance lessors are not product sellers.

(14) *State.*—The term means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, and any other territory or possession of the United States, or any politi-

cal subdivision of any such State, commonwealth, territory, or possession.

SECTION 203. APPLICABILITY AND PREEMPTION

Section 203(a)(1) provides that the product seller fair treatment title governs any product liability action brought in any State or Federal court.

Section 203(a)(2) provides that civil actions for commercial loss are not subject to the title, but are governed by applicable commercial or contract law.

The title follows the traditional rule applied in the overwhelming majority of States by indicating that claims for commerial loss—loss or damage caused to a product itself, loss relating to a dispute over the value of a product, or consequential economic loss (*i.e.*, loss of profits due to an inability to use the damaged product)—should be governed exclusively by applicable commercial or contract law. The leading case is *Seeley* v. *White Motor Co.*, 403 P.2d 145 (Cal. 1965), which takes the position that damage to the product itself and commercial losses are remedies that should be decided under the Uniform Commercial Code. The United States Supreme Court strongly endorsed this principle in an admiralty case, *East River Steamship Co.* v. *Transamerica Delaval, Inc.*, 476 U.S. 858 (1986). This "economic loss rule" is part of the *Restatement (Third) on Torts: Products Liability* § 21 (1997).

Section 203(b)provides that the product seller fair treatment title supersedes State law only to the extent that State law applies to an issue covered by the title. Any issue that is not governed by the title, including any standard of liability applicable to a manufacturer, shall be governed by applicable State or Federal law.

Section 203(c) lists a number of laws that are not superseded or affected by the title. The title does not waive or affect the defense of sovereign immunity of any State or of the United States; supersede or alter any Federal law;[16] waive or affect any defense of sovereign immunity asserted by the United States; affect the applicability of any provision of chapter 97 of title 28 of the United States Code; preempt State choice-of-law rules with respect to claims brought by a foreign nation or citizen of a foreign nation; or affect the right of any court to transfer venue or to apply the law of a foreign nation or to dismiss a claim of a foreign nation or of a citizen of a foreign nation on the ground of inconvenient forum.

The title also does not supersede or modify any statutory or common law, including an action to abate a nuisance, that authorizes a person to institute an action for civil damages or civil penalties, cleanup costs, injunctions, restitution, cost recovery, punitive damages, or any other form of relief for remediation of the environment (as defined in section 101(8) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601(8)). Such actions, which are brought against owners or operators of facilities as opposed to product manufacturers and sellers, involve separate policy considerations and relate to acts that are different from the acts for which this title provides rules of law.

[16] For example, the provisions of the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.*, the Oil Pollution Act of 1990 (P.L. 101–380), the Trans Alaska Pipeline Authorization Act (P.L. 93–153), and Federal maritime law are not affected by the title.

The exception for environmental cases in this section makes clear that this title does not apply to actions for damage to the environment. The title does apply to all product liability actions for harm, as defined in Section 202(7).

SECTION 204. LIABILITY RULES APPLICABLE TO PRODUCT SELLERS, RENTERS AND LESSORS

Section 204 is intended to bring legal fairness to product sellers, renters, and lessors, and reduce costs to consumers. Currently, under the law in about 30 States, product sellers are potentially liable for defects that they are neither aware of nor able to discover. Product sellers, however, rarely pay the judgment, because in over 95% of the cases where any liability is present, the manufacturer of the product is held responsible for the harm. Based on this showing, the seller gets contribution or indemnity from the manufacturer, and the manufacturer ultimately pays the damages.

This approach generates substantial, unnecessary legal costs, which are passed on to consumers in the form of a hidden "tort tax." A more efficient approach would be for the claimant to sue the product seller only if it is directly at fault.

Section 204 recognizes the unfairness and illogic of imposing "strict" liability upon small business product sellers who neither participate in the design process for products they sell, nor create warnings or instructions for a product. Following the lead of 21 States,[17] Section 204 would hold product sellers, such as wholesalers, distributors, and retailers, liable only if they are directly at fault for a harm (*e.g*, misassembled the product or failed to convey appropriate warnings to customers), unless the manufacturer of the product is out of business or otherwise not available to respond in a lawsuit. State product seller fair treatment legislation has worked well; some State laws have existed for almost two decades and none have been repealed.

Section 204 assures that product sellers are not needlessly brought into product liability lawsuits. It also promotes sound public policy by encouraging product sellers to select the safest products for sale and to deal with responsible manufacturers who will be available and have assets in the United States in case a lawsuit arises because a product was defective. Finally, Section 204 assures that an injured consumer will always have available an avenue for recovery.

Two reasons have been advanced for holding product sellers liable as if they were manufacturers. First, it has been argued that the rule promotes safety and reduces the risk of harm, because product sellers will seek to avoid liability by pressuring manufacturers to make safe products. This rationale, however, fails to recognize that manufacturers will feel the same, if not greater, pres-

[17] See Colo. Rev. Stat. § 13–21–402 (1998); Del. Code Ann. tit. 18 § 7001 (1998); Ga. Code Ann. § 51–1–11.1 (Supp. 1999); Idaho Code § 6–1407 (1999); 735 ILCS 5/2–621 (1999) (formerly Ill. Rev. Stat. ch. 110, ¶2–621 (1989)); Iowa Code § 613.18 (Supp. 1997); Kan. Stat. Ann. § 60–3306 (1998); Ky. Rev. Stat. Ann. § 411.340 (Michie/Bobbs-Merrill 1998); La. Rev. Stat. Ann. § 9:2800.53 (West 1999); Md. Cts. & Jud. Pro. Code Ann. § 5–405 (1999); Mich. Comp. Laws § 600.2947(6) (1999); Minn. Stat. § 544.41 (West 1998); Mo. Rev. Stat. § 537.762 (1999); Neb. Rev. Stat. § 25–21,181 (1998); N.C. Gen. Stat. § 99B–2 (1999); N.D. Cent. Code § 28–01.3–04 (Supp. 1999); N.J. Stat. Ann. § 2A:58C–9 (1999); Ohio Rev. Code Ann. § 2307.78 (Anderson 1999); S.D. Codified Laws § 20–9–9 (1999); Tenn. Code Ann. § 29–28–106 (Supp. 1999); Wash. Rev. Code § 7.72.040 (West 1999).

sure to make safe products if they are sued directly for harms caused by their own product defects. Second, it has been argued that the rule is fair because a product seller who is held liable for harm caused by a manufacturer's defect can seek indemnity and thereby shift the cost of liability to the manufacturer who actually caused the harm. Data show that, in fact, product sellers account for less than five percent of product liability payments, because generally they are either dismissed or indemnified.

Title II of the Act also provides relief for companies, such as car and truck rental firms, that rent or lease products. These companies are subject in 10 States and the District of Columbia to liability for the tortious acts of their lessees and renters, even if the rental company is not negligent and there is no defect in the product.[18] In these minority of States, a rental company can be held vicariously liable for the negligence of its customers simply because the company owns the product and has given permission for its use. Vicarious liability—liability without regard to fault—increases costs for rental customers nationwide and imposes an undue burden on interstate commerce.

Section 204(a)(1) provides that a product seller is only liable for harm proximately caused by its own failure to exercise reasonable care with respect to the product; by a product that fails to conform to their own express warranty made by the product seller; or the product seller's intentional wrongdoing. All three situations follow the rule that a product seller is responsible for the consequences of its own conduct.

Section 204(a)(2) provides that, except for breach of their own express warranty, a product seller will not be liable if there was no reasonable opportunity to inspect the product, or if the inspection, in the exercise of reasonable care, would not have revealed the aspect of the product which allegedly caused the claimant's harm. For example, a seller may not have had a reasonable opportunity to discover a product defect if the product was prepackaged or if the product never passed through the seller's hands (*e.g.*, a person may have held title to the product, but never had possession of the product).

Section 204(b)(1) provides that a product seller shall be treated as the product manufacturer and shall be liable for the claimant's harm as if the product seller were the manufacturer if the manufacturer is not subject to service of process under the laws of any State in which the action might have been brought by the claimant, or the court determines that the claimant would be unable to enforce a judgment against the manufacturer.

For example, a judgment would be unenforceable if the court finds that the manufacturer is bankrupt, insolvent, or otherwise unable to pay. A claimant may recover from the product seller for harms that were caused by the manufacturer if one of the two provisions applies, and if the claimant proves that the manufacturer would have been liable under State law.

---

[18] See Cal. Veh. Code § 17150–51 (West 1999); Conn. Gen. Stat. Ann. § 14–154a (West 1999); D.C. Code Ann. § 40–408 (1999); Idaho Code § 49–2417 (1999); Iowa Code § 321.493 (1997); Me. Rev. Stat. Ann. 29–A § 1652–53 (Supp. 1998); Mich. Comp. Laws Ann. § 257.401 (West Supp. 1999); Minn. Stat. § 170.54 (1998); Nev. Rev. Stat. § 482.305 (1999); N.Y. Veh. & Traf. § 388 (McKinney 1999); R.I. Gen. Laws § 31–33–6, 31–33–7 (1998).

To prevent the situation where a claimant may not become aware that the manufacturer lacks funds sufficient to satisfy the judgment until after the statute of limitations has expired, section 204(b)(2) provides that, for purposes of this subsection only, the statute of limitations applicable to claims asserting liability of a product seller as a manufacturer shall be tolled from the date of the filing of a complaint against the manufacturer to the date that judgment is entered against the manufacturer. Although section 204(b) departs from the notion of individual responsibility for harms, it ensures that a claimant can recover from the product seller if he or she is unable to recover from the manufacturer responsible for the harm.

Section 204(c)(1) provides that, for purposes of determining the applicability of this title to any person subject to section 204(c)(2), the term "product liability action" means a civil action brought on any theory for harm caused by a product or product use.

Section 204(c)(2) provides that parties engaged in the business of renting or leasing products, other than a person excluded from the definition of "product seller" under section 202(13)(B), shall be subject to liability in a product liability action in a manner similar to product sellers under section 204(a).

Section 204(c)(2) also preempts State vicarious liability laws, which hold the owner of a product, such as a motor vehicle, liable for the negligence of a user of the product, regardless of whether the owner of the product was negligent.[19] The title provides that any person engaged in the business of renting or leasing a product, including finance lessors, shall not be liable to a claimant for the tortious act of another solely by reason of ownership of the product.

SECTION 205. FEDERAL CAUSE OF ACTION PRECLUDED

Section 205 provides that Title II of the Act does not create any new basis for Federal court jurisdiction. The resolution of product liability claims subject to the title is left to State courts or to Federal courts that currently have jurisdiction over such claims.

TITLE III

Section 301 provides that the Act shall take effect with respect to any action commenced after the Act's date of enactment, without regard to whether the harm that is the subject of the action occurred before that date.

[19] The committee does not intend that section 204(c) preempt State minimum financial responsibility laws for motor vehicles. This subsection does not relieve the owner of any motor vehicle of responsibility to insure the vehicle to the amounts required under appropriate State law.

MINORITY VIEWS

We strongly oppose H.R. 2366, the so-called "Small Business Liability Reform Act of 2000." H.R. 2366 will fundamentally limit victims' rights to sue manufacturers and sellers for harm caused by dangerous products and negligence. There is no justification for this harmful tort reform bill that only serves to encourage more dangerous conduct that can injure working Americans, while shifting costs for the harm from businesses to consumers. H.R. 2366 is opposed by the Department of Justice,[1] The National Conference of State Legislatures,[2] the Council of State Governments,[3] Public Citizen,[4] the Violence Policy Center and Handgun Control[5] and the Association of Trial Lawyers of America.[6] This legislation is expected to be vetoed should it reach the President's desk.

Title I of H.R. 2366 caps punitive damages in all civil actions at the lesser of three times the amount of compensatory damages or $250,000 and eliminates joint and several liability for non-economic damages (such as loss of fertility, loss of limb, loss of a child, permanent disfigurement, or continuing, severe pain). Title II eliminates certain theories of liability for product liability actions against large and small product sellers.

H.R. 2366 is a dangerous and flawed piece of legislation that is not supported by any empirical or quantitative evidence. Its scope is expansive and misleading—among other things it applies to far more than product liability action and is in no way limited to small businesses. The legislation would also provide unwarranted protection to many gun manufacturers and virtually all gun dealers, and it raises serious federalism and constitutional concerns.

I. THERE IS NO EMPIRICAL EVIDENCE OF A SMALL BUSINESS LITIGATION CRISIS AND OF UNPREDICTABLE PUNITIVE DAMAGES AWARDS.

We are not aware of any credible empirical evidence to support the contention that there is currently a litigation explosion in the State and Federal courts, and that punitive damages are awarded

---

[1] See Letter from Assistant Attorney General Robert Raben, U.S. Department of Justice, Office of Legislative Affairs, to Chairman Henry Hyde, (October 18, 1999) (on file with the minority staff of the House Judiciary Committee) [hereinafter DOJ Letter].

[2] See Letter from William T. Pound, Executive Director, National Conference of State Legislatures, to Ranking Member Conyers (January 31, 2000) (on file with the minority staff of the House Judiciary Committee) [hereinafter State Legislature's Letter].

[3] See Letter from Tommy Thompson, President, Council of State Governments, to Ranking Member Conyers (September 29, 1999) (on file with the minority staff of the House Judiciary Committee) [hereinafter State Government's Letter].

[4] See Letter from Joan Claybrook, President, Public Citizen, to Chairman Henry Hyde, (October 18, 1999) (on file with the minority staff of the House Judiciary Committee) [hereinafter Public Citizen Letter].

[5] See Letter from Kristen Rand, Director of Federal Policy, Violence Policy Center, and Robert J. Walker, President, Handgun Control, Inc. to Ranking Member Conyers (October 25, 1999) (on file with the minority staff of the House Judiciary Committee) [hereinafter Violence Policy Center Letter].

[6] *Small Business Liability Reform Act: Hearing on H.R. 2366 Before the Comm. on the Judiciary*, 106th Cong. (1999) (statement of Richard Middleton, Jr., President, ATLA).

more often than in the most egregious cases. In his testimony before the House Judiciary Committee, Tom Bantle, Legislative Counsel to Public Citizen, explains why H.R. 2366 is unnecessary and unsubstantiated:

> [T]he fact is that the business climate in America is "about as good as it gets." There is no liability crisis for businesses. In fact liability insurance rates have consistently declined throughout the 1990s. The July 5, 1999 issue of *National Underwriting* notes continued liability premium decreases in 1998. The proponents of the bill have shown no basis for fundamentally altering the American Federal system of jurisprudence by stripping away from States matters traditionally governed by State legislatures and State courts.[7]

Similarly, the National Center for State Courts conducted an analysis demonstrating that there has not been a recent explosion in tort litigation. The Center found that the three types of tort actions affected by the bill—premises liability, medical malpractice, and products liability—make up only 25% of all tort filings combined. These actions combined are only 0.9% of all civil filings, and only 0.16% of all filings.[8] Moreover, the Center found that tort filings have dropped 9% since 1986.[9]

There is also little evidence to support the contention that the magnitude and unpredictability of punitive damages has created a need for tort reform. An exhaustive study regarding Federal and State product liability awards in 1992 by Professor Michael Rustad found only 355 punitive damage awards in product liability cases between 1965 and 1990.[10] In a study on the predictability of punitive damages, Professor Theodore Eisenberg found, that "[f]ar from picking numbers out of the air, jurors and judges across dozens of jurisdictions and many case categories determine punitive damages award levels with startling consistency."[11]

II. THE SCOPE OF H.R. 2366 IS EXPANSIVE AND MISLEADING.

The scope of H.R. 2366 is also expansive and misleading. First, the caps on punitive damages and the elimination of joint and several liability in Title I of the bill apply to any civil actions against small businesses, whereas previous tort reform bills applied solely to product liability claims. This application to any civil action is overbroad in that it covers lawsuits under malpractice, contract law, bankruptcy law, antitrust law, securities, fraud, and numerous other areas that are not properly considered liability reform. Next,

---

[7] *Small Business Liability Reform Act: Hearing on H.R. 2366 Before the Comm. on the Judiciary*, 106th Cong. (1999) (statement of Thomas L. Bantle, Legislative Counsel, Public Citizen at 5).

[8] National Center for State Courts. Examining the Work of the State Courts, (Brian Ostrom and Neal Kauder, eds., 1998) and National Center for State Courts, State Courts Caseload Statistics, 1997 (1998).

[9] *Id.*

[10] Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 Iowa L. Rev. 1, 38 (1992). Rustad is a Professor of Law at Suffolk University Law School.

[11] Theodore Eisenberg et al., *The Predictability of Punitive Damages* 18 (paper prepared for the John M. Olin Conference on Tort Reform, University of Chicago Law School, June 14, 1996) cited in Mark Galanter, Real World Torts: An Antidote to Anecdote, 55 Md. L. Rev. 1039, 1139 (1996). Eisenberg is the Henry Allen Mark Professor of Law at Cornell University Law School.

Title I defines a small business as a business with fewer than 25 employees, but does not include a minimum revenue requirement. As a result, some of the so-called small businesses that would benefit from the limitations on liability in this bill could be multi-million dollar companies with very small payrolls.

In addition, Title II of the legislation, which lessens the liability for those who sell or rent dangerous products, applies to all businesses, contravening the limitation to small businesses prescribed in the very title of the bill. Thus, while H.R. 2366 is described by its supporters as a "small business liability reform act," in reality, it appears to be another tort reform bill of general application.[12]

The legislation is also misleading in its claim that it excludes small businesses from civil liability in connection with acts which constitute "hate crimes."[13] This is because while the bill includes a hate crimes exclusion, the definition omits those acts which target victims on the basis of gender. Representatives Jackson Lee, Nadler, and Conyers sought to eliminate this problem through an amendment that would include gender in the definition of "hate crimes" and thereby exclude small businesses from the reduced level of liability created by this bill when they commit acts which amount to gender-based hate crimes. This was defeated on a party line vote. Small businesses that are guilty of committing acts of gender-based hate crime should not receive the benefit of more limited civil liability.

Finally, while H.R. 2266 purports to be two-way preemptive in its impact, in certain respects, it, remains one-way preemptive. This is because the bill is written to preempt only those State laws which specifically authorize the type of action being preempted.[14] The bill does not create punitive damages where States do not have or authorize punitive damages—it merely caps punitive damages in those States that already offer punitive damage awards. In other words, the bill is not truly achieving its stated goal of uniformity.

III. H.R. 2366 LIMITS VICTIMS' COMPENSATION AND DISCOURAGES CORPORATE RESPONSIBILITY.

Limits Punitive Damages

H.R. 2366 caps punitive damages in civil actions at the lesser of three times the amount of compensatory damages or $250,000 and establishes the high standard for the award of punitive damages of "by clear and convincing evidence that the conduct carried out by the defendant was either willful misconduct or was with a conscious, flagrant indifference to the safety of others and that this was the proximate cause of the harm that is the subject of the lawsuit."[15]

H.R. 2366 effectively requires a plaintiff to prove by "clear and convincing evidence" that the defendant specifically intended to cause injury to the plaintiff. While many States have raised the

---

[12] Representative Scott offered unsuccessfully three amendments, regarding the scope of the bill which limited Title I to tort liability actions, added a revenue requirement of $5,000,000 or less in each of the prior 2 years to the definition of small business and limited Title II to small businesses, respectively.

[13] Sec. 102(4). Under the bill, the definition of "hate crime" is the same as the definition in Section 1(b) of the Hate Crime Statistics Act (28 U.S.C. § 534 note).

[14] Section 106(a).

[15] Section 103.

standard for punitive damages from "by preponderance of the evidence" to "by clear and convincing evidence," we are not aware of any State that has limited punitive damages to intentional injury. Punitive damages impose punishment for outrageous and deliberate misconduct and they deter others form engaging in similar behavior. Collectively, these restrictions on punitive damages are likely to completely eliminate not only the incentive for seeking punitive damages, but any realistic possibility of obtaining them. In addition, absolute caps send a message to wrongdoers that it does not matter how harmful or malicious their behavior, they will never be liable for more than a set limit.[16]

It is instructive to consider the following examples of product liability cases against small businesses that could be effected by the punitive damages provisions of H.R. 2366:

- *California*—Lorena Davis, age 3, walked to the wood shop to visit her grandfather who was operating a sawmill designed and manufactured by Wood Mizer, Inc. Her hand got caught in an exposed rotating chain and sprocket mechanism, and she lost 3 fingers. A California jury determined that the sawmill was defectively designed and lacked warnings about this danger and awarded Lorena's family $420,000 in damages.[17] *Because Wood Mizer has fewer than 25 employees, the most it could be punished under this proposed legislation would be $250,000.*
- *Ohio*—Ronald Sizemore, age 18 months, was placed in his crib for the night dressed in a tank top and diaper. His tank top had become looped over a cornerpost on the crib. Testimony revealed that Connor Forest Industry, the manufacturer of the crib, was aware of numerous cases involving children being strangled by cribs with cornerposts, yet it continued to produce the cribs. The parties settled the case for approximately $400,000.[18] *Because Connor Forest Industry had fewer than 25 employees, the most it could be punished under this proposed legislation would be $250,000.*

Eliminates Joint and Several Liability for Non-Economic Damages

H.R. 2366 eliminates joint and several liability for non-economic damages (such as pain and suffering). Therefore, under this bill, a defendant in any civil action will only be liable for the portion of the judgment that corresponds to its percentage of responsibility. This diverges from the common law rule of joint and several liability found in many States. The rule states that if more than one defendant is found liable for a tort, each defendant is liable for the total damages; and if a defendant pays for more than its share, it may seek contribution from the other liable defendants. Instead of placing the burden of financial loss on the identifiable defendant, consumers who prevail on a liability claim may not be able to recover all of their damages. The principle behind joint and several

[16] Representative Scott offered unsuccessfully an amendment to strike this provision.

[17] *Lorena R. Davis* v. *Wood-Mizer Prods.*, 67 Cal. App. 4th 259 (Cal. Ct. App. 1998).

[18] See *The Small Business Liability Reform Act of 1999: Hearings on H.R. 2366 Before the House Comm. on the Judiciary*, 106th Cong. (1999) (Statement of Richard Middleton, Jr., President, Association of Trial Lawyers of America at 7–8).

liability is that as between an innocent plaintiff and a culpable co-defendant, it is preferable for the co-defendant to assume liability where other defendants are unable to assume liability rather than the victim of the tort.

Thus, this provision has the effect of making innocent victims bear the risk of loss when a co-defendant is judgment proof. It would severely discriminate against women and seniors who tend to earn lower incomes and therefore bear the greatest portion of non-economic damages in our society.[19] This can create grave inequities, as Public Citizen noted in their testimony:

> Take the case of a family dining at a small restaurant when a kitchen fire flares out of control, trapping the mother and daughter in the restroom. Both suffer extensive burns resulting in months of excruciating pain and permanent disfigurement. The fire had gotten out of control because the restaurant failed to have the number of fire extinguishers required by law and its automatic sprinkler system had been improperly installed by a construction company that had since gone bankrupt. In addition to medical bills, the jury had found that the mother and daughter should each receive $100,000 for pain and suffering and disfigurement. The jury had assessed the fault for the injuries at 20% to the restaurant for not having sufficient fire extinguishers and 80% to the bankrupt construction company. In many States, the small business's insurers would have to pay the family the whole $200,000 since the construction company could not pay its share. But under this bill, the wife and child would each receive only $20,000, 20 percent of the court's award, since the restaurant would not be jointly responsible for the non-economic damages. Would we consider that fair if it were our loved ones who suffered long-term excruciating and were permanently disfigured? [20]

H.R. 2366 exempts product sellers, renters and lessors from legal responsibility

H.R. 2366 exempts product sellers, renters and lessors from legal responsibility under the State law doctrines of strict liability, failure to warn, and breach of implied warranty. It provides that product sellers, renters and lessors, whether they are large or small businesses, may only be subject to product liability suit where they: (1) failed to exercise reasonable care, (2) violated an express warranty, or (3) engaged in intentional wrongdoing. This has the effect of eliminating seller liability under the theories of strict liability, failure to warn, or breach of implied warranty.

Under the theory of strict liability, which is available to plaintiffs in most States and which is set forth in the Restatement of Torts,[21] an injured plaintiff may prove her case by showing that the manufacturer or retailer breached their duty to supply safe products and

---

[19] Representative Scott offered unsuccessfully an amendment to strike this provision.

[20] *Small Business Liability Reform Act: Hearing on H.R. 2366 Before the Comm. on the Judiciary*, 106th Cong. (1999) (statement of Thomas L. Bantle, Legislative Counsel, Public Citizen at 2).

[21] See Restatement(3d) of Torts, Products Liability Sec. 1.

that this breach caused the plaintiff's injury. The rationale is that it is more fair for manufacturers and retailers to bear the burden of the product failure than it is to impose that burden upon the injured person since the manufacturer is in a better position to identify whether a product is dangerous and spread the cost of inherently dangerous products.

Unfortunately, this legislation would reverse these carefully considered State policy determinations by eliminating strict product liability for sellers. Some injured consumers could be left with no compensation for their injuries. Again, the bill shifts the cost of dangerous products from the retailers who profit from their sale to the injured consumers and their families, employers, and communities.

Immunity for Owners of Rental Equipment

H.R. 2366 also grants immunity to owners of rental equipment by eliminating the theory of vicarious liability. Under the theory of vicarious liability, liability is imposed on one person for the act of another based solely on a relationship between the two persons.[22] In 10 States and the District of Columbia, a rental company (a car rental company in particular) is held liable for the injuries and damages caused by the negligence of its customers because it owns the product and has given the customer permission to use it. These States have decided that it would be unfair to leave the injured consumer without compensation for injuries when the minimal insurance that is carried by negligent drivers is exhausted. Instead, these States have laws that place the loss on the company that rents cars, makes a profit and has the ability to self-insure for that liability by including that costs in its rental price. No evidence has been proffered to show why this change is necessary.[23]

IV. H.R. 2366 WOULD PROVIDE UNWARRANTED PROTECTION TO MANY GUN MANUFACTURERS AND VIRTUALLY ALL GUN DEALERS.

H.R. 2366 would also provide unprecedented legal immunity for irresponsible manufacturers and dealers of cheap Saturday night special handguns and assault weapons and would, therefore, have detrimental effects on gun safety. Because H.R. 2366 would cap punitive damages in lawsuits against companies with 25 or less employees, it would provide a windfall for many of the very worst gun manufacturers. Among the manufacturers protected is Intratec, the manufacturer of the infamous TEC–DC9 assault pistol, one of the guns used in the Columbine High School massacre.[24] The legislation would insulate manufacturers of dangerous guns to such an extent that Handgun Control, Inc., and the Violence Policy Center

[22] BLACK'S LAW DICTIONARY 1556 (6th ed. 1990).

[23] Representative Scott offered unsuccessfully an amendment to strike this provision.

[24] In addition to Intratec, the Violence Policy Center has identified at least 11 other Saturday night special and assault weapon manufacturers who would benefit from this bill. Among these manufacturers are: AA Arms, which continues to sell assault weapons manufactured before the 1994 Federal assault weapons ban; American Arms and American Derringer, who promote the ease of concealing their handguns; Armscorp, which offers a full catalog of pre-ban assault rifles; Auto-Ordnance, which manufacturers semi-automatic versions of the gangster-styled "Tommy Gun", and David Industries, Phoenix Arms and Sundance, three of southern California's leading manufacturers of Saturday night specials. "Small Favors," *Violence Policy Center Report*, 1998.

have indicated their strong opposition to it and noted that the bill "could be more aptly titled the 'Gun Industry Relief Act'." [25]

By limiting recovery against "product sellers" regardless of the size of their business, the bill would also substantially limit the liability of virtually all of America's more than 70,000 gun dealers. While the bill does exempt from its coverage some causes of action related to firearms, namely "negligent entrustment" and "negligence per se," the bill fails to recognize that gun safety litigation is an evolving area of the law and that a number of other theories have been successfully advanced against firearms retailers and proprietors of gun clubs or target ranges.[26] Rather than exempting causes of action on a piecemeal basis, it would be far better policy to exempt firearm-related suits from the bill's coverage completely.

Most egregiously, the bill fails to exempt several well-known causes of action: public nuisance, negligent marketing and unfair and fraudulent business practices, the cornerstone of recent lawsuits filed by approximately 20 cities and counties against the gun industry.[27] Yet, notwithstanding the geographic diversity and sheer number of cities that have filed these suits, the Majority rejected—on a party-line vote—an amendment offered by Congresswoman Zoe Lofgren that would have prevented the causes of action in these lawsuits from being adversely affected by this bill.[28] The Lofgren amendment would have exempted the precise causes of action used in the San Francisco and Los Angeles suits, among others, from both the cap on punitive damages against dangerous gun manufacturers and the restrictions on liability against irresponsible gun dealers.

V. H.R. 2005 RAISES SERIOUS FEDERALISM AND CONSTITUTIONAL CONCERNS.

We are also concerned by the majority's failure to consider or take into account the very serious federalism concerns raised by this legislation. Traditionally, the States—and not the Federal Government—have provided the means for victims of injury and tortious harm to sue to collect compensation. Assistant Attorney General Robert Raben outlined the Justice Department's federalism concerns regarding H.R. 2366 in a letter to the committee opposing the bill:

---

[25] Letter from M. Kristen Rand, Director of Federal Policy, Violence Policy Center, and Robert J. Walker, President, Handgun Control to the Honorable John Conyers, Jr. (D–MI), Ranking Member, House Committee on the Judiciary (October 25, 1999).

[26] The theories of public nuisance and trespass have been used successfully by plaintiffs harmed by bullets fired at gun clubs and target ranges. For example, Jackie and Nolan Vermillion purchased property in 1984. In 1986, the Pioneer Gun Club bought land next to the Vermillion's property. The couple sued the gun range claiming that bullets from weapons fired on the high-power range hit their house, their trees and other property. The plaintiffs claimed against the gun club for nuisance, trespass, negligence, and intentional infliction of emotional distress. The Missouri Court of Appeals upheld awards of $3,000 and $7,000 respectively on the nuisance and trespass claims. *Vermillion* v. *Pioneer Gun Club*, No. WD 50670, (Mo. App. 1996).

[27] Among the cities and counties that have filed these suits are: San Francisco (joining the city of San Francisco in this suit are the city of Berkeley, city of Sacramento, San Mateo County, Alameda County, city of Oakland and city of East Palo Alto), Los Angeles (joining the city of Los Angeles in this suit are the city of Compton, city of West Hollywood and city of Inglewood), Boston, Detroit, Camden, Newark, New Orleans, Chicago, Miami, Bridgeport, Atlanta, Cleveland, Cincinnati, St. Louis, Los Angeles County, and Washington, DC. This bill would adversely affect the ability of all of these cities to recover damages in all of these suits.

[28] Roll Call No. 2, November 2, 1999. The amendment was defeated 11 to 16.

> Because tort law is an area traditionally entrusted to the States, Federal intervention is appropriate only when absolutely necessary to address a specific and well-documented problem and only when the proposed Federal response is measured and balanced. H.R. 2366 fails on both accounts and, for that reason, the Department strongly opposes its enactment.[29]

In a letter to the Judiciary Committee, the National Conference of State Legislatures finds the sweeping preemption of State law in H.R. 2366 to be equally troubling:

> The tort law and its reform historically and appropriately have been matters within the jurisdiction of the States. States, over the past 15 years, have substantially reformed their tort laws to protect manufacturers and retailers from liability. There is no justification for Congress to intrude on the jurisdiction of States.[30]

Similarly, a letter from the Council of State Governments signed by Governor Tommy Thompson (R–WI) warned that "simply preempting current State law is not the appropriate way to address the problem of excessive litigation."[31]

Moreover, given the direction of recent Supreme Court decisions, the attempts to impose rules on State court civil justice systems raises serious constitutional questions. The bill may run afoul of the constitutional requirement under the 10th amendment, which reserves all of the unenumerated powers to the States.[32] This is a particular concern in light of the recent Supreme Court decisions such as *New York* v. *United States*[33] and *Printz* v. *United States*[34] in which the Court showed extreme scepticism regarding Congress' ability to dictate State legal policies.

Additionally, there is a blatant inconsistency in the rationale behind Federal preemption of State law in H.R. 2366. One of the stated purposes of the proposed bill is to promote the free flow of goods and services and lessen the burdens on interstate commerce. But, H.R. 2366 also provides that the Federal district courts shall not have jurisdiction over Title II of the bill.[35] Thus, the bill preempts State law in an effort to promote interstate commerce, but at the same time, denies the right to the Federal courts to hear the cases on Commerce Clause grounds. We do not understand how there could be a compelling Federal interest to pass this legislation and

---

[29] See DOJ letter at 1. See also, State Legislatures Letter and State Governments Letter.

[30] See Letter from William T. Pound, Executive Director, National Conference of State Legislatures, to Ranking Member Conyers (January 31, 2000) (on file with the minority staff of the House Judiciary Committee).

[31] See Letter from Tommy Thompson, President, Council of State Governments, to Ranking Member Conyers (September 29, 1999) (on file with the minority staff of the House Judiciary Committee).

[32] The 10th amendment provides "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend X.

[33] 505 U.S. 144 (1992) (invalidating a Federal law requiring States to assume ownership of radioactive waste or accept legal liability for damages caused by the waste because it was found to "commandeer the legislative processes of the States").

[34] 521 U.S. 898; 117 S.Ct. 2365; 138 L.Ed. 2d 914; 65 U.S.L.W. 4731 (U.S. June 27, 1997) (invalidating portions of the Brady Act requiring local law enforcement officials to conduct background checks on prospective gun purchasers).

[35] Under 28 U.S.C. § 1337, the Federal district court has original jurisdiction over any civil action or proceeding arising under any act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

at the same time there is no equally compelling interest to give the Federal courts the right to hear cases in this area. To address this inconsistency, Representative Watt offered an amendment, which was rejected, to give back jurisdiction to the Federal courts in civil actions arising under any act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. As the legislation now stands, it would provide for a Federal Government mandate on a variety of legal issues, without allowing for any Federal court review to resolve the inevitable ambiguities and inconsistencies that will arise in construing the mandate. This will result in varying State standards—the exact opposite of the drafter's intent.

There is also the potential that H.R. 2366 may implicate fifth amendment due process [36] and seventh amendment right to trial [37] issues. The due process concern stems from the fact that the leading Supreme Court case, *Duke Power Co.* v. *Carolina Envtl. Study Group*,[38] left open the question as to whether it is was necessary for Federal tort laws to provide an offsetting legal benefit or *quid pro quo* to justify the deprivation of tort rights (which the legislation does not appear to do). As for the seventh amendment, although the right to jury trial has been found not to apply to Federal limitations imposed on State courts, the seventh amendment could apply to diversity cases brought in Federal court, particularly if the limitation on liability is seen as extinguishing a "common law" right.[39]

We would also note that the Majority's supposed federalism "fix"—allowing the States to opt out of Title I if the State enacts a statute which cites subsection 106 of the bill and contains no other provision—is practically meaningless and disdainful of State rights. Congress has no right to intrude on State prerogatives and justify by saying the States can reenact and reclaim their laws—this puts federalism on its head. In addition, where does Congress have the right to say the manner in which States may try to overturn this Federal mandate? The fact that other provisions may be added in the legislation should be of no business to a Congress which itself frequently legislates through omnibus legislation dealing with thousands of matters. This provision does not even allow for voter referendum—a form of State government the Majority has previously sought to protect through special legislation.

---

[36] The fifth amendment provides that no person shall be "deprived of life, liberty, or property without due process of law," a proscription which has been held to include an equal protection component. U.S CONST. amend. V.

[37] The seventh amendment provides, "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend VII.

[38] 439 U.S. 59, 87–88 (1978) (upholding Price-Anderson Act which, *inter alia*, capped liability at federally supervised nuclear power plants and mandated waiver of defenses in event of nuclear accident).

[39] See *Tull* v. *United States* where the seventh amendment was found not apply to the statutory civil penalty caps in the Clean Water Act, 481 U.S. 412 (1987), since the assessment of civil penalties involved neither the "'substance of a common-law right to a trial by jury' nor a 'fundamental element of a jury trial.'" On the other hand, in the 1935 case *Dimick* v. *Schiedt*, 293 U.S. 474 (1935), the Court found unconstitutional the Federal practice of additur, because increasing the amount of a jury award was a question of "fact" protected by the seventh amendment.

CONCLUSION

In our view, this legislation is not only unnecessary, it is misleading and it is reckless. It is being propounded at a time when there is no credible empirical evidence indicating there is a litigation explosion or crisis, or that punitive damages are awarded in any but the most egregious cases. While it is described as a bill which is limited to small businesses, in actuality the legislation represents a windfall to businesses with millions of dollars of profits and hundreds of thousands of employees and to their insurers. There is no justification for this harmful piece of tort reform that leaves consumers and their families without full compensation for their injures. For the above reasons, we dissent.

JOHN CONYERS, JR.
HOWARD L. BERMAN.
JERROLD NADLER.
MELVIN L. WATT.
SHEILA JACKSON LEE.
MARTIN T. MEEHAN.
ROBERT WEXLER.
ROBERT C. SCOTT.
ZOE LOFGREN.
MAXINE WATERS.
WILLIAM D. DELAHUNT.
STEVEN R. ROTHMAN.
ANTHONY D. WEINER.

○